CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 700

JOHN H. PAGE, TRUSTEE, ETC., PETITIONER,

vs.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36,514)

(36,514)

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the October Term, 1931, of said Court, before the Honorable William S. Kenyon and the Honorable Wilbur F. Booth, Circuit Judges, and the Honorable Charles A. Dewey, District Judge.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the tenth day of January, A. D., 1931, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein John H. Page, Trustee for Mike Lyvers Syndicate, was Appellant and the Arkansas Natural Gas Corporation was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

Citation on Appeal.

In the District Court of the United States for the Western District of Arkansas, El Dorado Division.

John H. Page, Trustee for Mike Lyvers Syndicate, Plaintiff,
No. 47 vs. In Equity.
Arkansas Natural Gas Corporation, Defendant.

The United States of America—ss.

To Arkansas Natural Gas Corporation,—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, State of Missouri, within forty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Arkansas, in a suit wherein John H. Page, Trustee for Mike Lyvers Syndicate, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said John H. Page, Trustee for Mike Lyvers Syndicate, should not be corrected and why speedy justice should not be done to the parties on that behalf.

Dec. 24, 1930.

FRANK A. YOUMANS,
Judge, District Court of the United States for the Western District of Arkansas.

Witness the Honorable Frank A. Youmans, Judge of the District Court of the United States for the Western District of Arkansas, this 24th day of December, 1930, and of the 154th year of the independence of the United States of America.

.....
Clerk, United States District Court,
Western District of Arkansas.

Service of the foregoing accepted this 26th day of December, 1930.

JEFF DAVIS,
Atty for Defendant.

2 Service of a copy of the foregoing citation is acknowledged.

This the .... day of December, Nineteen Hundred Thirty.

.....
Solicitor for Arkansas Natural Gas Corporation, Defendant-Appellee.

Endorsed: Filed in U. S. District Court on Jan. 8, 1931.

---

3 District Court of the United States Western District of Arkansas, El Dorado Division.

John H. Page, Trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate, Plaintiffs,
No. 47. vs. In Equity.
Arkansas Natural Gas Corporation, Defendant.

Record of proceedings in the District Court of the United States for the Western District of Arkansas, El Dorado Division, in the above entitled cause, begun against Natural Gas & Fuel Corporation as party defendant and proceeding to final decree against Arkansas Natural Gas Corporation, substituted defendant:

4 Transcript of Removal.

Filed in U. S. District Court February 15, 1928.

In the United States District Court for the Western District of the State of Arkansas, El Dorado Division.

John H. Page, Trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate, Plaintiffs,
No. 47 vs. Equity.
Natural Gas and Fuel Corporation, Defendant.

Transcript.

Removed from the Union Chancery Court, Second Division, in the 13th Chancery District of the State of Arkansas, by Order of the Honorable George M. LeCroy, Chancellor, on the 6th day of February, A. D. 1928.

Complaint in Equity.

Union Chancery Court, Second Division.

John H. Page, Trustee for Mike Lyvers Syndicate and Mike Lyvers Syndicate, Plaintiffs,
No. 3051. vs.
Natural Gas & Fuel Corporation, Defendant.

Plaintiffs for cause of action state:

That the defendant, Natural Gas & Fuel Corporation is a corporation organized under the laws of the State of Delaware, is a citizen and resident of said state, and by a compliance with the laws of the State of Arkansas, is and at all times hereinafter named, was authorized to do business in the State of Arkansas, with its principal place of business in the city of El Dorado, in said State. That Jeff Davis has been designated by said corporation as its agent upon whom service of summons in the State of Arkansas could be had.

That on February 3, 1923, Mike Lyvers Syndicate, a trust estate, was organized with Mike Lyvers sole trustee, under the common law as required in the state of Arkansas by declaration of trust which was filed for record in Union County, Arkansas, on February 22, 1923, and is recorded in the records of said county in Record Book 157, page 235, a copy of which declaration of trust is filed herewith, marked exhibit "A" and made a part hereof.

That on April 26, 1923, the said Mike Lyvers Syndicate, acting by and through Mike Lyvers as trustee, acquired an oil gas and mineral lease covering the W½ of the NW¼ of the NW¼ Section 9, township 16 south, range 15 west, Union County, Arkansas, which lease is recorded in said county, in Record Book 161, page 377, a copy of which lease is filed herewith, marked "exhibit B" and made a part hereof.

That on July 2, 1923, the said Mike Lyvers Syndicate, acting by and through Mike Lyvers, trustee, acquired an oil, gas and mineral lease covering the E½ of the NW¼ of NW¼ Section 9, township 16 south, range 15 west, Union County, Arkansas, which said lease is recorded in said county in Record Book 167, page 497 a copy of which said lease is filed herewith, marked exhibit "C" and made a part hereof, the said described property lying and being within the jurisdiction of this Honorable Court.

That during the month of December, 1923, the Harry Morris Guaranteed Gusher Syndicate No. 3, the same being a

common law trust, organized under and recognized by the laws of the State of Arkansas, with Harry N. Morris as trustee, was adjudicated a bankrupt in the Texarkana Division of the United States Court for the Western District of Arkansas; that during the pendency of said bankrupt proceedings of the Harry Morris Guaranteed Syndicate No. 3, Harry N. Morris, Trustee, Mike Lyvers, the original trustee named in the declaration of trust of the said Mike Lyvers, filed in said bankruptcy proceedings a personal intervention claiming to be the owner of the oil, gas and mineral leases covering the property above described, the same being the NW¼ of the NW¼ of Section 9, Township 16 south, range 15 west, Union County, Arkansas, in which said petition is a description of said leases, copy of which is together with exhibits attached to same is filed herewith, marked exhibit "D" and made part hereof, but no appearance of any sort was made by Mike Lyvers as trustee of Mike Lyvers Syndicate.

That on a hearing before the Referee in Bankruptcy of said intervention the issue of the ownership of the oil, gas and mineral leases covering said land was decided adversely to the contention of the said Mike Lyvers, it being held by the referee that the title to said property was in the trustee of said bankrupt estate of Harry Morris Guaranteed Gusher Syndicate No. 3, and the said Mike Lyvers was ordered to execute conveyances, transferring said property to the trustee in bankruptcy of said cause, H. M. Barney, a copy of which order of the Referee is filed herewith, marked Exhibit "E" and made part hereof. That on April 23, 1924, the petition for review of said order of the Referee requiring the said Mike Lyvers to execute conveyances of said leases covering the NW¼ of NW¼ of Section 9, township 16 south, range 15 west, Union County, Arkansas, to H. M. Barney, Trustee, came on to be heard before the Hon. Frank A. Youmans, Judge of the United States Court for the Western District of Arkansas, in which proceeding the court sustained the finding and order of the Referee requiring the said Mike Lyvers to convey to H. M. Barney, Trustee, of the Harry Morris Guaranteed Gusher Syndicate No. 3, bankrupt, by quit claim deed, all of the property described in said intervention of Mike Lyvers which included among other property, the leases covering the 40 acres of land hereinbefore described, copy of which finding and order of the said Frank A. Youmans, Judge, is filed herewith, marked exhibit "F" and made a part hereof.

7 That after the making and entering of the order aforesaid by the said Frank A. Youmans, Judge, and on the 13th day of October, 1924, Mike Lyvers, at the instance of said H. M. Barney, Trustee in Bankruptcy, ostensibly to carry out the orders of the court in the intervention of the said Mike Lyvers executed and acknowledged a certain quit claim deed purporting to convey to the said H. M. Barney, trustee of the Harry Morris Guaranteed Gusher Syndicate No. 3, in Bankruptcy, the oil, gas and mineral leases covering the lands above described, which deed was prepared by the said Barney to be signed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate, and which was so signed by the said Mike Lyvers at the instance and direction of the said Barney, trustee as aforesaid, which said quit claim deed is filed for record in Union County, Arkansas, in Record Book 197, page 247 copy of which said quit claim deed is attached hereto, marked Exhibit "G" and made a part hereof.

That said deed, referred to in last paragraph, was not executed by the said Mike Lyvers under or in keeping or in compliance with the order of the Hon. Frank A. Youmans, Judge, which was an order to the said Mike Lyvers, personally, to quit claim, and did not include any order or direction to the said Mike Lyvers to execute quit claim to said property as trustee of the Mike Lyvers Syndicate and that the same was executed by the said Lyvers in the belief that he was acting in compliance with the order of the court, made and entered in this intervention of the Harry Morris Guaranteed Gusher Syndicate No. 3, bankruptcy matter, which in fact was not true, as shown by the order of the court heretofore filed as exhibit herein.

That at the time the said Harry Morris Guaranteed Gusher Syndicate No. 3, was in bankruptcy, the said H. M. Barney as trustee of said bankrupt estate, had no right, power or authority to acquire any property for said estate, but his sole and only duty as such trustee was to take and hold, subject to the orders of the court, such property as the bankrupt itself had and owned. That the Bankrupt
8 never had or owned any right, title or interest in or to the leases covering the 40 acres of land hereinbefore described, which at all times was owned by the Mike Lyvers Syndicate, a common law trust, of which Mike Lyvers was trustee.

In the bankrupt court, in the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris,

trustee on January 29, 1925, issued an order for the sale of the property belonging to said syndicate and on the 2nd day of March, 1925, H. M. Barney, trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, executed a certain conveyance to the Natural Gas & Petroleum Corporation of El Dorado, Arkansas, purporting to convey all "of my right, title and interest to the oil and gas leases described as follows, and to the lands covered by them", under which description, among other lands and leases appears the NW¼ of the NW¼ Section 9, township 16 south, Range 15 West, Union County, Arkansas, being the same lands herein described and referred to, which conveyance from H. M. Barney to the defendant herein is now of record in Union County, Arkansas, in record book 201, page 369, copy of which is attached hereto, marked Exhibit "H" and made a part hereof.

That at the time of the execution of said conveyance by the said H. M. Barney, Trustee to the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, to the said Natural Gas & Petroleum Corporation, the said Natural Gas & Petroleum Corporation was fully advised that the NW¼ of the NW¼ of Section 9, township 16 south, range 15 West, was in truth and in fact the property of Mike Lyvers Syndicate, a trust estate.

That the trust estate hereinbefore referred to as Mike Lyvers Syndicate was organized for the benefit of certificate holders owning and holding certificates of interest therein to the amount of approximately $200,000.00 being the sum paid to the original trustee of said syndicate, Mike Lyvers. That the value of said trust estates was $10.00. That the
9 holders of these certificates are the equitable holders of said leases. That at no time did Mike Lyvers Syndicate owe any obligation of any kind or character to the said Harry Morris Guaranteed Gusher Syndicate No. 3, to convey the above described leases to the said Harry Morris Guaranteed Gusher Syndicate No. 3, for the purchase of said lands or any interest whatever therein. That the quit claim deed executed by Mike Lyvers and signed by him as trustee for the Mike Lyvers Syndicate was not ordered to be made or executed by the said Frank A. Youmans, Judge, in matter of Harry Morris Guaranteed Gusher Syndicate No. 3, but that said order and all proceedings representing same, had and done in said bankruptcy matter, were in the name of Mike Lyvers as an individual and did not affect the title to the above described leases, which syndicate did not appear

in said proceedings through Mike Lyvers, trustee for it or otherwise.

That the quit claim deed required to be executed by Mike Lyvers to H. M. Barney, Trustee of Harry Morris Guaranteed Gusher Syndicate No. 3, bankrupt, was never ordered by the court or judge thereof to be executed by the said Mike Lyvers as trustee for said syndicate, and that the said Barney was without direction of the court, or right or authority to so require said deed to be executed by the said Mike Lyvers acting in his capacity as trustee for Mike Lyvers Syndicate. That said deed was without consideration.

That plaintiff is informed that the said Mike Lyvers has signed other instruments at the instance of the said H. M. Barney, Trustee, affecting the interest of the Mike Lyvers Syndicate in and to the leases covering the lands hereinbefore described, for the alleged purpose, the time of the execution of same, or correcting certain errors in description. That plaintiff is informed, believes and therefore avers that after the execution and delivery by the said H. M. Barney, trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, of said conveyance of March 2, 1925, that defendant entered upon the leases hereinbefore described, which cover the NW¼ of the NW¼ Section 9, township 16 South, Range 15 West, taking possession thereof and all personal property thereon situated and that it has taken and produced large quantities of oil from said leases covering said land and has sold the same and converted the proceeds arising therefrom to its own use, which plaintiff, on information and belief, avers is in excess of $500,000.00, under claim of being the owner thereof, and still holds possession thereof, is operating said lease, producing oil therefrom and converting the proceeds to its own use without accounting to plaintiff for any part of same.

That the defendant, Natural Gas & Fuel Corporation, claims an interest in and to the above described leases, adverse to this plaintiff, and which claim this plaintiff avers is wholly unfounded in law and equity and that the question of such claim of right depreciates plaintiff's title to this property and prevents him from using the property, obtaining the proceeds from oil taken therefrom and selling the property and otherwise harrasses, annoys and obstructs the plaintiff in the possession and enjoyment of said leases. That any claim of the defendant to said leases, the oil produced therefrom or the proceeds thereof is in fact without right, claim

or interest, legal or equitable, in said lands, premises, leases or any part thereof.

That the said Natural Gas & Petroleum Corporation and also the said Natural Gas & Fuel Corporation had knowledge of all of the above facts by reason of the fact that the attorney, Jeff Davis, was fully aware of the above facts, and was their attorney at the time of the transfer made to the Natural Gas & Petroleum Corporation, and at the time any assignment and transfer was made to the Natural Gas and Fuel Corporation.

That said claim of the defendant, Natural Gas & Fuel Corporation, operates as, and is a cloud upon the title of plaintiff to said land, leases and premises, and is causing the plaintiff irreparable injury while the defendant continues to set up and claim title to said land and premises adverse to this plaintiff, and to waste and convert to its own use
11 the proceeds of oil produced from said lands.

That on October 25, 1925, Mike Lyvers, Trustee of Mike Lyvers Syndicate under authority of the declaration of trust creating said syndicate, a trust estate, copy of which declaration of trust is filed herewith as exhibit "A", designated the plaintiff herein as trustee of said trust estate and as his successor to said trusteeship, himself resigning therefrom.

That since the execution of said conveyance, mentioned above, to the Natural Gas & Petroleum Corporation by H. M. Barney, Trustee of Harry Morris Guaranteed Gusher Syndicate No. 3, the said Natural Gas & Petroleum Corporation has transferred all of its right, title and interest to the Natural Gas & Fuel Corporation. That the said Natural Gas & Fuel Corporation is owned and controlled by the same officers, and the stock is held by the same parties who hold the stock of the Natural Gas & Petroleum Corporation, and that the defendant Natural Gas & Fuel Corporation took title to said property with full knowledge of all things imputed to the said Natural Gas & Petroleum Corporation.

That the plaintiff is without a complete and adequate remedy at law.

Wherefore, plaintiff prays: First: That the Defendant be required to answer and set forth the ground and nature of its claims of title to said leasehold premises, and that this court may determine each of said claims and pretentions, to the end that it may be adjudged that they are unfounded in

law and equity, and that the plaintiff is the owner of said property and entitled to the possession thereof. Second: That the defendant be required by proper orders of the court to account for said property; for all oil taken therefrom; for all proceeds arising from the sale of said oil, and any other income derived by the defendant from the property herein described: Third: That the defendant be directed
12 to transfer and turn over to the plaintiff, by proper deed assignment or other conveyance, the above described property, and to pay over to the plaintiff all cash received from the sale of oil or gas derived from same, and to deliver to the plaintiff all oil in the possession of the defendant, delivered from said leasehold premises and to render to the plaintiff a full accounting, together with all costs of this action. Fourth: And plaintiff further prays that he may have such other, further and general relief in the premises as [—] the court may seem just, fit and [property] and equitable.

FRANK J. LOONEY,
PUGH, GRIMMETT & BOATNER,
McNALLEY & SELLERS,
By Jordan Sellers,
Attorneys for Plaintiff.

Endorsements: "Filed Dec. 20th, 1927. O. A. Miles, Clerk, A. G. Williams, D. C."

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13 (Record Entry of Issuance of Summons.)

Summons issued against Natural Gas & Fuel Corp., December 30th, 1927.

Summons served on Joe Zeppa for The Natural Gas & Fuel Corp. on January 4th, 1928.

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14 Notice of Intention to File Petition and Bond for Removal.

To Messrs. McNalley and Sellers, Frank J. Looney, Pugh Grimmett & Boatner, Solicitors for the Plaintiffs:

Notice Is Hereby Given that the Natural Gas and Fuel Corporation, defendant in the above entitled cause will, on the 18th day of January, 1928, file in the Chancery Court, State of Arkansas, for the county of Union, Second Division, in which the above entitled cause is now pending, its petition and bond for removal of said cause from said court to the

District Court of the United States, for the Western District of Arkansas, El Dorado Division.

A copy of said petition and bond is attached hereto, and made a part hereof.

JEFF DAVIS,
Solicitor for Defendant.

This is to acknowledge that the foregoing notice, together with a copy of the petition for removal and bond referred to, was served upon the undersigned, as solicitors for the plaintiffs, on this the 17th day of January, 1928.

McNALLEY & SELLERS,
By Jordan Sellers.

A copy of petition and bond attached hereto shown at sheets Nos. ..... in Transcript.

Filed: January 18th, 1928, O. A. Miles, Clerk. By M. W. Wortham, D. C.

---

15 Petition for Removal.

In the Union Chancery Court, Second Division.

John H. Page, Trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate, Plaintiff,
3051 vs.
Natural Gas & Fuel Corporation, Defendant.

To The Honorable George M. Lecroy, Judge of Union Chancery Court, Second Division, Sitting at El Dorado, Arkansas.

Now comes the Natural Gas and Fuel Corporation, defendant in the above entitled cause, and files this its petition for removal of this cause from the Chancery Court of Union County, Arkansas, Second Division, in which it is now pending to the District Court of the United States in and for the Western District of Arkansas, El Dorado Division, held in the city of El Dorado, Union County, Arkansas.

Your petitioner would show as follows:

(1) That this cause was filed in this court on the 30th day of December, 1927, and that the time within which the defendant is allowed to plead, answer or demur to the complaint herein filed, under the laws of the state of Arkansas, has not expired, nor has the defendant taken any step in this cause to

waive its right to remove the same to the United States District Court for the proper district.

(2) That at the time of the commencement of this suit, the plaintiff, John H. Page, was a citizen and resident of the State of Arkansas, County of Pulaski, and that said plaintiff has been a citizen and resident of said county and state at all times since the filing of this suit to this time. That the Mike Lyvers Syndicate is not a legal entity capable of being a party plaintiff in any court, but that "Mike Lyvers Syndicate" is merely a name by which Mike Lyvers designated the beneficiaries in whose behalf he conducted certain activities as trustee, and that, if Mike Lyvers Syndicate is a [legally] entity competent to sue as a party plaintiff, it is at this time, and has at all times in the past during its existence
16 been domiciled in the State of Arkansas, and has been a citizen and resident of that state.

That the defendant Natural Gas and Fuel Corporation was at the time of the filing of this suit, and has been at all times since, and now is, a citizen and resident of the state of Delaware, being a corporation organized and existing under and by virtue of the laws of that state.

3. That this suit is one of a civil nature in equity, of which the District Court of the United States for the Western District of Arkansas, El Dorado Division, has original jurisdiction.

That the claim of the plaintiff, in substance, is that Mike Lyvers, as Trustee, for the Mike Lyvers Syndicate, owned an oil and gas lease covering the NW¼ of the NW¼ of Section 9, Township 16 South, Range 15 West, Union County, Arkansas, from a time during the year 1923, until the said Mike Lyvers disposed of said lease, as hereinafter stated.

That Harry Morris and Harry Morris Guaranteed Gusher Syndicate No. 3, a business trust, of which the said Harry Morris was trustee, were adjudicated bankrupt by judgment of the United States District Court for the Western District of Arkansas, Texarkana Division, and that H. M. Barney was trustee of both estates in bankruptcy.

That the said H. M. Barney, as such trustee, had possession and claimed the title to the above described oil and gas lease. Whereupon, Mike Lyvers intervened in the bankrupt matter in which the said H. M. Barney was acting as such trustee and claimed title to the said oil and gas lease.

That upon due hearing, it was decided by the referee in bankruptcy in said matter that Mike Lyvers had no title to said lease, that the true owner thereof was Harry Morris Guaranteed Gusher Syndicate No. 3, and that, consequently, H. M. Barney, as trustee in bankruptcy of the estate thereof, was entitled to said lease.

That from said order of the trustee in bankruptcy,
17 Mike Lyvers appealed to the United States District Court for the Western District of Arkansas, Texarkana Division, on which appeal the above mentioned holding of the Referee in Bankruptcy was affirmed, and Mike Lyvers was ordered by said court to convey to H. M. Barney, Trustee for Harry Morris Guaranteed Gusher Syndicate No. 3, all of his right, title, interest or claim to said oil and gas lease.

That, purporting to act under said order, the said Mike Lyvers executed a quit claim deed of said lease to H. M. Barney, as such trustee, signing said deed "Mike Lyvers", and also signing it "Mike Lyvers, trustee for Mike Lyvers Syndicate"; and has executed further instruments to that effect, at the request of H. M. Barney.

That Mike Lyvers was not ordered by the decree of the United States District Court to convey to H. M. Barney, as such trustee, any interest in said lease which he held as trustee for Mike Lyvers Syndicate, and that his quit claim of said lease, executed by him as trustee for the Mike Lyvers Syndicate, was not in compliance with the order of said District Court, and that he had no authority to transfer any interest as such trustee, to H. M. Barney, since said lease was at all times owned by Mike Lyvers Syndicate, and that said quit claim deed was executed for no consideration.

That on March 2, 1925, the Natural Gas and Petroleum Corporation purchased the above described oil and gas lease from H. M. Barney, trustee for Harry Morris Guaranteed Gusher Syndicate No. 3 and Harry Morris, which lease was assigned by it to the Natural Gas & Fuel Corporation, a corporation controlled by the same officers and stockholders as the Natural Gas and Petroleum Corporation, both of said corporations having full knowledge of the facts alleged, as above.

That the Natural Gas and Fuel Corporation produced large quantities of oil from the above described lease, of value in excess of $500,000.00 and is still producing oil from it.

18 The plaintiff, who alleges that he is trustee of Mike Lyvers Syndicate, as successor of Mike Lyvers, there-

fore, prays that the defendant be required to assign to the plaintiff the above described oil and gas lease, together with all personal property on it, and be required to pay to the plaintiff all of the money received from the sale of oil or gas from said lease.

Your petitioner states that this suit is one to enforce an equitable claim to the title to real property within the limits of the Eldorado Division of the United States District Court for the Western District of Arkansas.

4. Your petitioner further states that the matter in controversy in this cause exceeds in value, exclusive of interest and costs, the sum of $3,000.00.

5. Your petitioner herewith files a good and sufficient bond, under the statute in such cases made and provided conditioned, as the law directs, that it will, within thirty days from the filing of the petition for removal herein, file with the United States District Court for the Western District of Arkansas, El Dorado Division, a certified copy of the records in this cause, conditioned also upon this petitioner's payment of all costs which may be awarded by the United States District Court, if said court shall determine that this suit was improperly or wrongfully moved thereto.

Your petitioner, therefore, prays that this court proceed no further herein, except to order the removal of this cause to the United States District Court for the Western District of Arkansas, El Dorado Division, accept and approve the bond of the petitioner herewith presented, and direct a transcript of the records in this cause to be certified as provided for by law.

JEFF DAVIS,
Attorney for Petitioner.

I, H. F. Nash, under oath state that I am Vice President of the Natural Gas and Fuel Corporation, petitioner in the foregoing petition, and that I have read the same, and that the statements of fact therein contained are true and correct.

HAROLD F. NASH.

19 Subscribed and sworn to before me, the undersigned, a Notary Public, on this the 17th day of January, 1928.

(Seal) SALLIE E. MASON.

Filed January 18, 1929. O. A. Miles, Clerk, By M. W. Wortham, D. C.

Bond for Removal.

Know All Men By These Presents:

That the Natural Gas and Fuel Corporation, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto John H. Page, Trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate, and their heirs and assigns, by these presents; yet upon the condition:

That the said Natural Gas and Fuel Corporation, defendant, having filed a petition in the Union Chancery Court, Second Division, for the removal of a certain cause therein pending, wherein John H. Page, trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate, are plaintiffs and the Natural Gas and Fuel Corporation is defendant, to the United States District Court, Western District of Arkansas, El Dorado Division:

Now, if your petitioner, Natural Gas and Fuel Corporation, shall enter in said District Court of the United States to be held in the district where such suit is pending, within thirty days from the filing of the petition for the removal of said cause, a certified copy of the record therein, and shall well and truly pay the costs that may be awarded by the said District Court of the United States, if the said court shall hold that this suit is wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 17th day of January, 1928.

NATURAL GAS AND FUEL CORPORATION, Principal;
By Howard F. Nash, Vice President.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety.
(Seal) By John M. Henry, Attorney in Fact.

Filed January 18th, 1928.

O. A. MILES, Clerk,
By M. W. Wortham, D. C.

21 (Order of Removal.)

In the Union Chancery Court, Second Division.

John H. Page, Trustee for Mike Lyvers Syndicate, and Mike Lyvers Syndicate; Plaintiffs,
No. 3051. vs.
Natural Gas and Fuel Corporation, Defendant.

On this the 6th day of February, 1928, a regular day of the February term of this court, comes to be heard, the above entitled cause on the complaint hereinbefore filed by the plaintiff and the petition for the removal of this cause to the United States District Court for the Western District of Arkansas, El Dorado Division, hereinbefore filed by the defendant.

The defendant appearing specially herein for the purpose of said motion, it was found by the court that the defendant had filed a bond in due form executed by it as principal and by the United States Fidelity and Guaranty Company, surety, guaranteeing the filing of a certified copy of the record in this cause in said United States District Court within thirty days of the date of the filing of the petition for removal and guaranteeing the payment of all costs to the plaintiffs if it is held that this cause was improperly removed.

Being well and truly advised as to the issues of law involved, it is by this court ordered and decreed that the bond for removal hereinbefore filed by the defendant be, and it is hereby approved, and that this cause be, and the same is hereby removed to the United States District Court of the Western District of Arkansas, El Dorado Division.

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22 Fee Bill.

Clerk's costs,	$10.85
Sheriff's costs,	1.25
This transcript,	12.50
Total,	24.60

State of Arkansas,
County of Union—ss.

I, O. A. Miles, Clerk of the Union Chancery Court, Second Division, within and for the county and state aforesaid, do hereby certify that the above is a true, correct and complete fee bill in the above styled cause, as fully as the same appears on record and on file in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, on this the 15th day of February, A. D. 1928.

O. A. MILES, Clerk,
(Seal) By R. L. Ford, D. C.

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23 (Clerk's Certificate to Transcript from State Court.)

State of Arkansas,
County of Union—ss.

I, O. A. Miles, Clerk of the Union Chancery Court, Second Division, within and for the County and State aforesaid, do hereby certify that the annexed and foregoing sheets of typewritten matter contain a true, correct and complete transcript of all proceedings had in said court in cause No. 3051, wherein John H. Page, Trustee for Mike Lyvers Syndicate and Mike Lyvers Syndicate was plaintiff, and Natural Gas and Fuel Corporation was Defendant, as fully as the same remains of record and on file in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, on this the 15th day of February, A. D. 1928.

O. A. MILES, Clerk,
By R. L. Ford, D. C.

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24 Exhibit "A" to Plaintiff's Complaint.

Filed in U. S. Distrirt Court April 18, 1928.

Mike Lyvers Syndicate

A Trust Estate.

Know All Men By These Presents: That I, Mike Lyvers, Trustee, being about to take title to certain oil and gas leases, with all property thereon or appertaining thereto, hereby declare that I will, and my heirs, successors, administrators and executors shall hold said oil and gas leases and any and all property, real and personal, which may be conveyed or transferred to me as trustee hereunder, upon the trusts hereinafter made, set forth, published and declared on this 6th day of February, 1923, for the benefit of the owners of the certificates of interest hereinafter described, to-wit:

Article I.

Sec. 1. This trust estate shall be known and designated to the public as:

Mike Lyvers Syndicate.

Sec. 2. Mike Lyvers shall be and is hereby constituted the trustee of this estate, and shall be known and designated to the public as such trustee until otherwise superseded, succeeded or replaced, as in these articles provided.

Sec. 3. All cestuis que trustent under and of this trust shall be known and designated to the public as beneficiaries.

Article II.

Sec. 1. For the purpose of selling and otherwise disposing of equitable estates in the corpus, and for the purpose of exchanging and commerce thereof, and for evidencing in writing the measure and existence of equitable estates in the corpus, the trustee shall issue certificates as in these articles, hereinafter provided for each sum of $10.00 or multiple thereof, paid to the trustee under this agreement, but no certificates shall be issued for any sum less than $10.00, which shall be deemed evidentiary of the amount paid in.

Sec. 2. The sum of $10.00 paid to the trustee shall entitle the payer to a benefit of the trust estate as cestui que trust.

Sec. 3. No valuation of the corpus of this trust shall ever attain a any time as a constant valuation of the entire equity of the estate at a standard of value thereof effective for the purpose of limitation upon the trustee in securing trust funds as hereinafter provided with which to function in his fiduciary and ministerial capacities as such trustee of this estate.

Article III.

Sec. 1. Any and all persons whomsoever, cestuis que trustent under and of this trust shall become such cestuis que trustent in the following manner:

(a) By virtue of settlement in these articles at which time a use is declared and set forth.

(b) By purchase for a consideration of money or its equivalent from the trustee, his agent or attorney.

(c) Acquisition in due course in trade and commerce.

Article IV.

Sec. 1. Any and all persons whomsoever cestuis que trustent under and of this trust shall become such cestuis que trust-

ent subject to such powers or revocation, substitution and alienation as in these articles provided.

(a) In event any res or part or parcel or all of the corpus shall be alienated by the trustee, such alienation shall work a revocation of any further estate or use in the same by any cestue que trust whomsoever, and in event any res or part or parcel or all of the corpus of this trust shall be pledged, encumbered, or in any manner or form subjected to a lien by the trustee, such lien shall be paramount to the estate of equity of the respective cestuis que trustent.

(b) Provided, however, that in event of alienation as provided in sub-paragraph "a", the equitable estate of the respective cestuis que trustent shall follow the proceeds of such alienation, and attach and attain as an equitable estate
26 therein to the same extent, and shall further attach and attain in any res or part of the corpus acquired in lieu of or in substitution of the same, alienated. It being specifically provided that the respective estates of equity to the use of the respective cestuis que trustent are not limited and confined in or to any specific res, but are at all times equitable estates in the corpus of the trusts.

(c) Provided, further, that the respective equitable estates to the use of the cestuis que trustent shall be further limited as in these articles hereinafter provided.

(d) Provided, further, that the respective equities in the corpus as may be acquired by the cestuis que trustent, shall at all times be, and is an incorporeal estate of use to a specified extent to which extent the respective cestuis que trustent may have an inseparable and undivided use in the corpus, subject, however, to all provisions in these articles, and such use and incorporeal property right is purely an equitable right, the right to have the corpus managed and controlled by the trustee for the benefit of the cestuis que trustent respectively and their assigns, and such equitable estate in the corpus shall inure to the use of the respective cestuis que trustent, their heirs, endorsers and assigns, as hereinafter provided.

Article V.

Sec. 1. The equitable estates in the corpus of the respective cestuis que trustent, as herein provided for, shall be evidenced by certificates in writing issued by the trustee, each certificate stating and signifying the extent of the use in the estate to which the person named therein is entitled.

Sec. 2. The certificates shall have no value as a contract, stock, bond or a security of any nature or kind whatsoever, and they shall confer no voice or co-proprietorship upon the respective cestuis que trustent in the conduct, management and control and operation and functioning of the trustee or of the estate of this trust; and the right of certificate holders is expressly limited to receiving such distributions of
27 the income and proceeds of the corpus of the trustee as the trustee may in his discretion, from time to time declare and distribute.

Sec. 3. In no event shall the corpus of this trust, nor any fund or res of same, be construed to secure in any way whatsoever the certificates issued by the trustee to the respective cestuis que trustent, nor shall such certificate be considered in any event as a numiment of title to any estate in the corpus, and the office of same is merely evidentiary of the right of the cestuis que trustent in such certificate specified as in these articles provided.

Sec. 4. In no event shall the cestuis que trustent have the right to partition or division of any of the physical assets of this trust, nor shall their participations in the respective uses to which they may be entitled extend beyond a pro rate distribution of the earnings, incomes and profits of the corpus as the trustee may from time to time declare and distribute, and subject to the provisions of these articles.

Article VI.

Sec. 1. The certificates issued by the trustee evidencing in writing the existence and measure of the equity of the respective cestuis que trustent shall be negotiable and shall be transferrable by endorsement, and the negotiation of any such certificates by the respective cestuis que trustent shall be and constitute an authority in writing authorizing the trustee to recognize the bearer of such certificate as having succeeded the endorser to the extent of the use in the certificate designated and specified; nothing herein, however, shall impair the right of a partial or total assignment of the use of any of the cestuis que trustent.

Sec. 2. The certificates as in these articles provided for shall be as follows:

Mike Lyvers Syndicate,

Mike Lyvers, Trustee,

A Trust Estate.

28 This Certifies That:

Under declaration of trust dated the 6th day of February, 1923, recorded in the Records of Union County, Arkansas, which is by reference thereto made a part and condition of acceptance hereof, ... or order, shall benefit in the above named trust in such proportion as the sum of $..... shall at all times bear to the total amount represented by all outstanding certificates issued by the trustee.

In Witness Whereof, this certificate is issued by the trustee, this the ..... day of ....., 1923.

(Seal of Trustee) MIKE LYVERS SYNDICATE,
By Mike Lyvers, Trustee.

Sec. 3. Transfers of the certificates above named and as provided for shall not require the trustee to take notice thereof unless the certificates shall be surrendered to the trustee to enable him to record the transfer of the use of the transferer to such transferee on books of the trustee to be kept for that purpose and which the transfer of such certificates, as above provided, shall authorize him to do; whereupon, he shall then issue a new certificate or certificates, as the occasion may require, and may charge therefor a transfer fee of fifty cents. When and after such transfer and recognition of the transferee there shall exist a fiduciary relation of trustee and cestuis que trust, and such transferee shall thereafter benefit in this trust as in these articles provided.

Article VII.

Sec. 1. The respective cestuis que trustent shall incur no personal liability by any act or thing done by the trustee in the control, management and execution of the business and affairs of this trust, nor any part thereof, neither shall the trustee in any event have recourse to the cestuis que trustent for the payment of any expenses or liability incurred.

29 Article VIII.

Sec. 1. The purpose of this trust shall be to hold the above and foregoing mentioned oil and gas leases and any other oil and gas leases or property, real or personal, that may be acquired by this trust estate, and further, to do all the

necessary and incidental things for the operation, maintenance and development of such property, consisting of the following acts:

(a) To drill for, produce, refine and market petroleum and its products, and natural gas.

(b) To buy, sell, lease, exchange and barter oil and gas leases, royalties and mineral rights;

(c) To buy, sell and barter crude and refined oils and petroleum products.

(d) To buy, sell, barter and exchange chattels and personal property of every kind and character, necessary and incident, remote or proximate, for the effective execution and accomplishment of the purposes above mentioned.

(e) To buy, sell, trade and exchange real estate and chattels, necessary and incident to the above and foregoing purposes, and by these articles the trustee is authorized and empowered to do any and all acts and things authorized by law in order to promote, affect and procure the purposes of this trust, as herein enumerated.

Sec. 2. The principal office of the trustee of this estate may be at any place which he shall in his discretion designated, and he may remove the same to any other place and establish branch offices as he may see fit.

Article IX.

Sec. 1. The trustee in these articles named shall subscribe his name thereto, and acknowledge the execution of these articles and shall thereupon be and remain such trustee at pleasure, subject, however, to the provisions of these articles which shall apply with like force and effect to any successors trustee.

Sec. 2. The signature and acknowledgment of these articles of the trustee herein named shall be conclusive of his acceptance of the fiduciary relation of trustee, to all cestuis que trustent whom shall become such cestuis que trustent as in these articles provided, in present and in future, and the appointment of a successor trustee as in these articles provided, in present and in future, shall appear of record as amendment to this trust agreement, and shall thereupon be conclusive as to the appointment of such trustee and the same shall be binding upon the cestuis que trustent, and such successor trustee shall be bound by all provisions of these articles.

Article X.

Sec. 1. The trustee of this trust estate shall be self perpetuating and as such trustee shall own in his own name the legal title to the corpus of the trust and shall have the absolute management and control of the whole and entire res or corpus, both in present and future, including the power of sale, pledging, mortgaging, bonding and the incumbrancing in any manner or form whatsoever, together with the absolute power of alienation, substitution and distribution as in these articles provided.

Sec. 2. He shall at all times have the right to resign as such trustee, of his own motion, respectively and shall have the exclusive power and discretion in the appointment of a successor, which appointment shall be binding upon and conclusive as to the cestuis que trustent.

Sec. 3. Any such successor trustee shall succeed to all of the powers, rights, title, privileges and immunities that his predecessor shall have had.

Sec, 4. The death, resignation or absconding of the trustee or any successors trustee shall not dissolve or otherwise affect this trust, except as in these articles provided, nor shall it confer or extend any power, right or privileges upon any cestuis que trust for the conduct, management or control of the estate, nor for the election of any successor trustee, but in such event a successor trustee shall be appointed or the estate wound up and distributed as a court of competent jurisdiction shall adjudge and direct upon application therefor.

31 Sec. 5. The earnings, profits, income and proceeds of this trust and from the alienation of any res or property in the corpus may be from time to time declared and distributed among the cestuis que trustent, placed on deposit for any purpose or reinvested, in whole or in part, and in such proportions as in the discretion of the trustee may be deemed beneficial and proper to the best interest of the cestuis que trustent, and all power herein conferred by these articles, and all acts and things done and performed as in these articles provided shall be done and administered wholly in the discretion of the trustee.

Article XI.

Sec. 1. The trustee shall incur no personal liability in the discharge of his ministerial acts as such trustee in the management, control and operation, alienation, substitution, in-

cumbrancing or any other act of any kind or nature whatsoever, nor by investing or reinvestment of any trust.

No liability of the trustee shall ever accrue to any cestuis que trustent, or to any person not in privity to these articles, neither shall he incur any personal liability in contract or in tort while functioning in his respective capacity as such trustee, under the powers and authority by these articles delegated and conferred.

Article XII.

Sec. 1. The trustee, either in person or by his agents or attorneys in fact, shall authorize the transaction of any business or the doing of any act or thing which the trustee is by these articles empowered and authorized to do, and may, when occasion demands, delegate and confer power of attorney for the doing of any act or thing in his name, place and stead, without liability or restriction.

Sec. 2. All business transactions by the trustee as such trustee of this estate shall be kept in detail, in record form.

32

Article XIII.

Sec. 1. This trust may endure for the life of the trustee herein named, and hereunto subscribed, and for twenty-one years thereafter.

Article XIV.

Sec. 1. The trustee may at all times, for value, sell or otherwise dispose of equitable estate in the corpus, as in these articles provided, to such extent as in his discretion he may see fit, and may close the sales of same at pleasure, and the proceeds from the sale of such equitable estate in the corpus shall accrue and enure to the trustee as trust fund by him to be expended in his discretion for promoting, procuring and effecting the purpose of this trust.

Sec. 2. The trustee may charge all brokers and agents commissions to income or to trust funds derived from the sale of equitables in the corpus as he may see fit.

Article XV.

Sec. 1. All conveyances to the trustee of this estate shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and all conveyances from such trustee shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and likewise all written instruments pertaining to this trust shall be so executed.

Sec. 2. No bond shall be required of the trustee herein named, but he may voluntarily and of his own volition enter into any undertaking for the faithful discharge and performance of his duties as he may desire, and may in his discretion require an undertaking for the faithful discharge and performance of the duties of any agent or employee, and may in event he shall appoint a successor trustee, require such bond of such successor trustee, as in his discretion he may see fit.

Article XVI.

Sec. 1. The trustee of this trust estate shall in no event have recourse to the cestuis que trustent for the payment of any expenses or liabilities incurred in the execution of
33 any powers, authority, duties or obligations of any nature or kind by these articles conferred and required, neither shall the equitable estate of the respective cestuis que trustent be subject to any tax or assessment by the trustee for the payment of same, and the corpus of this trust shall be the extent and the sole and only source of payment or reimbursement for any liabilities or expenses incurred by the trustee in his capacity as such trustee of this estate, provided, however:

Sec. 2. That the trustee may expend such part of the trust funds as may come into his hands and of the profits and proceeds of the corpus and such parts and parcel of the corpus as may be necessary and incidental within his discretion for maintaining offices, hiring skilled and unskilled labor, experts and legal counsel and for the defraying the expenses of litigation in prosecuting and defending suits at law, and in equity on behalf of this estate. He shall further receive a reasonable compensation for his services, as such trustee, to be payable from time to time as he may in his discretion elect, and shall be entitled to reimbursement to the extent of any reasonable expenses incurred in the conduct and discharge of his duties as such trustee on behalf of this trust estate, and the trustee shall be entitled to twenty-five per cent of all the profits made from the sale of any lease or leases or for the profits and from the productions of any oil well or wells which may be brought in during the life of this estate.

Article [CVII.]

Sec. 1. It is by these articles expressly provided that the corpus of this trust shall be the extent of satisfaction of liabilities incurred to any and all persons whomsoever, and this agreement and declaration of trust, of record in any county and state wherein an office of the trustee shall be located and maintained, shall be public notice to all persons whomsoever

of the limitation of liability as in these articles provided, nor shall the trustee have power or authority to incur any liability in excess of the corpus of this trust, neither in
34 contract nor in tort.

Sec. 2. This agreement of record shall further be notice to the public of the fiduciary relation created and existing by virtue of these articles and of the non-association of the trustee with the cestue que trustent, and of the non-association of the cestuis que trustent with each other, as the purpose of these articles is to create an express and active trust, the management and execution of which is wholly in the discretion of the trustee without voice or control by any cestuis que trust whomsoever.

Article XVIII.

Sec. 1. The trustee herein named and all successors trustee may in his discretion terminate this trust by merger or reorganization in any manner or form whatsoever, and nothing herein shall be deemed to construe as a limitation or restriction upon such power or authority of the trustee, likewise the trustee may in his discretion alter, amend or abrogate any part or all of this trust agreement, as in his discretion he shall deem best in the conduct, management and control of this estate, to the best interests of the cestuis que trustent.

Article XIX.

Sec. 1. The respective cestuis que trustent under and of this trust, to the use of whom a settlement is made and a use declared to the extent as in these articles provided, and for the purpose of creating this trust are as follows:

To all parties who buy beneficial interests or shares in this trust estate, either by the payment of cash, property or labor.

Article XX.

Sec. 1. In construing this agreement and declaration of trust, the same shall be construed as a whole and in any event should any clause, sub-paragraph or article hereof be adjudged invalid such adjudication shall not affect the rest of this declaration of trust, nor shall any construction be placed upon this agreement whereby the power and authority of absolute management and control of this estate inde-
35 pendent of the cestuis que trustent shall be impaired.

In Witness Whereof this declaration of trust is executed by the settler, for the uses and purposes therein mentioned and set forth.

MIKE LYVERS, Trustee.

State of Arkansas,
County of Union—ss.

Be It Remembered, That on this day came before me, a Notary Public, within and for said county and state, duly commissioned and acting, Mike Lyvers, Trustee, to me well known to be the grantor in the foregoing instrument of writing, and stated that he had executed the same for the consideration, uses and purposes therein mentioned and set forth.

Witness my hand as such Notary Public this 21st day of February, 1923.

(Seal) E. L. COPELAND,
Notary Public.

My commission expires: 12/26/26.

Certificate of Record.

State of Arkansas,
County of Union—ss.

I, H. G. Williams, Circuit Clerk and Ex-Officio Recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on this the 22nd day of February, A. D. 1923, at 9 o'clock A. M., and that the same is now duly recorded, with the acknowledgments and certificates thereon, in Record Book No. 157, page 235.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 9th day of March, 1923.

H. G. WILLIAMS, Clerk.

157-235 Mike Lyvers Syndicate. Dec. of Trust. 9-235. Filed for record Feb. 22, 1923, at 9 o'clock A. M. H. G. Williams, D. C.

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36 Exhibit "B" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

Assignment of Oil and Gas Lease.

Whereas, on the 19th day of May, 1923, a certain oil and gas mining lease was made and entered into by and between J. A. Bilyou and M. D. Bilyou, his wife lessor, and J. W. Olvey lessee, covering the following described land in the county of Union and state of Arkansas, to-wit:

Northwest quarter (NW¼) of the Northwest quarter (NW¼) Section Nine (9), Township Sixteen (16) South, Range fifteen (15) west.

Said lease being recorded in the office of the Recorder in and for said county, in Book 133, page 425, and,

Whereas, the said lease and all rights thereunder and incident thereto, upon the lands hereinafter described, are now owned by Otto L. Morris.

Now, therefore, for and in consideration of one dollar, and other good and valuable considerations, the receipt whereof is hereby acknowledged I, the undersigned, as the present owner of the said lease and of all rights thereunder, do hereby bargain, sell, transfer, assign and convey all right, title and interest of the original lessee and of the present owner—therein, together with all personal property used or obtained in connection therewith, to Mike Lyvers Syndicate and his heirs, successors and assigns, insofar as the same covers the following described property, to-wit:

West One Half (W½) of Northwest quarter (NW¼) of Northwest quarter (NW¼) Section Nine (9) Township Sixteen (16) South, Range Fifteen (15) West.

And for the same consideration, the undersigned, for himself and his heirs, successors, representatives and assigns, does covenant with the said assignee ..... successors, heirs or assigns, that he is the lawful owner of the said lease and the rights and interest thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and encumbrances, and that all
37 rents and royalties which have fallen due and payable thereunder have been fully paid.

Witness our hands and seals this 26th day of April, 1923.

OTTO L. MORRIS (L. S.)

Acknowledgment.

State of Arkansas,
County of Union—ss.

Be It Remembered, that on this day came before me, the undersigned, a Notary Public within and for the county and state aforesaid, duly commissioned and acting Otto L. Morris to me well known as the grantor in the foregoing assignment,

and stated that ..... had executed the same for the uses, purposes and considerations therein mentioned and set forth.

Witness my hand and seal as such Notary Public aforesaid, this 28th day of April, 1923.

(Seal) F. L. COPELAND,
Notary Public.

My commission expires Dec. 26, 1926.

Certificate of Record.

State of Arkansas,
County of Union—ss.

I, H. C. Williams, clerk of the Circuit Court and Ex-officio Recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 28th day of April, A. D. 1923 at 9:15 o'clock A. M., and the same is now duly recorded with the acknokledgment and certificate thereon, in Record Book, Vol. 161, page 377.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of May, A. D. 1923.

(Seal) H. C. WILLIAMS, Clerk,
By ....., Deputy Clerk.

38 Clerk's Certificate of Transcript.

The State of Arkansas,
County of Union.

I, H. G. Williams, Clerk of the Circuit Court within and for the county and state aforesaid, do hereby certify that the annexed and foregoing pages contain a true and complete transcript of the assignment of oil and gas lease from Otto L. Morris to Mike Lyvers Syndicate as same appears of record, on page 377 Record, Volume 161 Union County, Arkansas.

Witness my hand and official seal, this 12th day of November, 1925.

(Seal) H. G. WILLIAMS, Clerk,
By W. P. Norman, D. C.

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39 Exhibit "C" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

Assignment of Oil and Gas Lease.

Whereas, on the 19th day of May, 1923, a certain oil and gas mining lease was made and entered into by and between

J. A. Bilyeu and M. D. Bilyeu, his wife, lessors, and J. W. Olvey, lessee, covering the following described land in the county of Union and State of Arkansas, to-wit:

The NW¼ of the NW¼ of Section 9, Township 16 South, Range 15 West,

Said lease being recorded in the office of the recorder in and for said county, in Book 161 page 377, and,

Whereas, the said lease and all rights thereunder and incident thereto, upon the lands hereinafter described, are now owned by Otto L. Morris,

Now, therefore, for and in consideration of One Dollar, and other good and valuable considerations, the receipt of which is hereby acknowledged, Otto L. Morris the undersigned, as the present owner of the said lease and of all rights thereunder, does hereby bargain, sell, transfer, assign and convey all right, title and interest of the original lease and of the present owner therein, together with all personal property used or obtained in connection therewith, to Mike Lyvers Syndicate, Mike Lyvers, Tr., and his heirs, successors and assigns insofar as the same covers the following described property, to-wit:

The E½ of the NW¼ of the NW¼ of Section 9, Township 16 South, Range 15 West, Union County, Arkansas.

Assignee herein assumes all oil payments against said land.

And for the same consideration, the undersigned, for himself and his heirs, successors, representatives and assigns, do covenant with the said assignee, successors, heirs or assigns, that he is the lawful owner of the said lease and the right and interests thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and encumbrances, and that all rents and royalties which have fallen due and payable thereunder have been fully paid.

Witness our hands and seals this 2nd day of July, 1923.

OTTO L. MORRIS (L. S.)

Acknowledgment.

State of Arkansas,
County of Union—ss.

Be It Remembered, that on this day came before me, the undersigned, a Notary Public, within and for the county and

state aforesaid, duly commissioned and acting Otto L. Morris, a single man, to me well known as the grantor in the foregoing assignment, and stated that he had executed the same for the uses, purposes and considerations therein mentioned and set forth.

Witness my hand and seal as such Notary Public aforesaid, this 5th day of July, 1923.

(Seal) F. L. COPELAND,
Notary Public.

My commission expires 12/26/26.

Certificate of Record.

State of Arkansas,
County of Union.

H. G. Williams, Circuit Clerk and ex-Officio Recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on this the 10th day of August, A. D. 1923, at 11:45 o'clock A. M., and that the same is now duly recorded, with the acknowledgment and certificates thereon, in Record Book No. 167, page 497.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 13th day of August, 1923.

(Seal) H. G. WILLIAMS, Clerk.

167-497 Assignment of Oil and Gas Lease. From Otto L. Morris to Mike Lyvers Synd.

State of Arkansas,
Union County—ss.

I hereby certify that this instrument was filed for record on the 10th day of August, A. D. 1923, 11:45 A. M. and duly recorded in Book ..... of ..... at page .....

H. G. WILLIAMS,
Circuit Clerk and Recorder.

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41 Exhibit "D" To Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

In the United States District Court for the Western District of Arkansas, Texarkana Division.

In the matter of the Guaranteed Gusher Syndicate Number Three, Harry Morris, Trustee.

To The Honorable Judge of Said Court:

Now comes Mike Lyvers, of Shreveport, Caddo Parish, Louisiana, one of the creditors of the above Bankrupt Estate, and would respectfully represent that he is informed and believes that Honorable H. M. Barney, Trustee of the above Bankrupt estate has taken possession of, and is claiming certain individual property of the said Mike Lyvers as being property of the bankrupt estate.

That the said bankrupt owned certain oil and gas leases and the personal property thereon in the County of Union and Ouachita, State of Arkansas.

That affiant was informed and believes that the said trustee of the said Bankrupt estate is attempting to sell and will probably sell certain, if not all, of the properties belonging to the said bankrupt, and that affiant is informed and believes and so alleges that the said trustee is laying claim to and will probably attempt to sell certain of affiant's properties on, to-wit: February 8, 1924, in the city of El Dorado, Union County, Arkansas.

That a list of all of said properties so claimed by affiant attached hereto marked "Exhibit A" and made a part hereof, that in addition to the land described in said exhibit, affiant claims as his own all personal property on said lands, a list being to-wit: All of the property used in connection herewith as being oil well supplies, furnishings, casings, etc.

Your petitioner would further request that the trustee be required to turn to him all producing property held by the said Trustee belonging to the said Mike Lyvers, as well as all personal property used in connection therewith.

42 Wherefore, your petitioner prays that the Judge of the Court, or the Referee therein order that the said Trustee do not sell any of said properties claimed herein.

(Sgd.) MIKE LYVERS.

State of Arkansas,
County of Miller.

Before me, the undersigned authority, Notary Public in and for the County of Arkansas, on this day personally appeared Mike Lyvers, who being by me duly sworn, does upon his oath state that all of the above and foregoing allegations are true in substance and in fact.

(Sgd.) MIKE LYVERS.

Sworn to and subscribed before me this 7th day of February, A. D. 1924. Notary Public, Miller County, Arkansas.

(Sgd.) GUY McCLERKING,
Notary Public, Miller County, Arkansas.

My commission expires: June 30, 1927.

Exhibit "A" (to Intervention)

One (1) well, McAdoo Lease, N½ SE¼ SW¼, 10 A; Sec. 10-16-16. Our interest 7/16 until $15,000.00 has been paid out of 7/16 first oil run before our interest will be 7/8 (well Drg.) ¼ interest, to Mike Lyvers.

J. A. Bilyeo Farm, 40 A; NW¼ NW¼ Sec. 9-16-15, Our int. 7/6 until $16000.00 is paid from 7/6. This lease is in Union County, Arkansas, and is owned by Mike Lyvers.

N ¾ or 15 acres of E½ of SW¼ of NE¼, 33-15-16. Three producing wells, all equipment, Union County, and Fincher lease South 10 acres of E 22½ acres of North 32½ acres, NE¼ SE¼—29-15-16, Ouachita County.

And any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers Trustee in Union and Ouachita Counties, Arkansas.

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43 Exhibit "E" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

Order Denying Intervention of Otto L. Morris and Mike Lyvers.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt. No. 674.

On this March 6, 1924, the interventions of Otto L. Morris and Harold L. Lyvers (Mike Lyvers claiming certain oil leases and other properties set out in the interventions and petitions of trustee to require interveners to execute deeds comes on for hearing upon the interventions, the objections of the trustee, petitions to require interveners to execute deeds and conveyances the motion to dismiss filed by interveners,

the testimony of F. L. Coepland, Jesse Riggs, Harry G. Miller, P. J. Moran and B. Bender, and also certified copies of the various assignments of oil leases, and all exhibits to the testimony of H. L. Williford, and from the evidence the Referee finds that:

All of the property claimed by the interveners was purchased with the funds of the bankrupt, derived from the sale of units in the trust estate of Harry Morris Guaranteed Gusher Syndicate No. 3, the bankrupt herein, and that the title to the various properties, including the property intervened for and more particularly set out in the various assignments introduced in evidence, was taken in the name of Mike Lyvers, and Otto L. Morris, and also in the name of Mike Lyvers, Trustee in Bankruptcy herein. All of said property was merely held by said parties for the benefit of the bankrupt and they had no interest in same otherwise. They not only handled these properties in this manner but handle other properties in like manner and in the name of various syndicates for their own convenience. All of the properties
44 belonged to a common fund, although badly commingled and hard to trace owing to the absence of the books of the various syndicated including those of the bankrupt; and also because the interveners have failed and refused to appear before the referee and testify.

The interveners appeared by attorney at the various hearings held on these interventions, and the witnesses on behalf of the trustee were cross-examined by various attorneys representing the interveners, and also the bankrupt.

It is therefore ordered that the interventions of Otto L. Morris and Harold L. (Mike) Lyvers be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate, and each is hereby ordered to execute conveyances transferring the legal title to all said properties to the trustee in bankruptcy, H. M. Barney.

(Signed) G. G. POPE,
Referee in Bankruptcy.

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45 Exhibit "F" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

(Order of District Court Affirming Order of Referee.)

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt. No. 674 In Bankruptcy.

On this 23rd day of April, 1924, comes on to be considered the petition of Mike Lyvers for review of the order of the Referee herein requiring said Mike Lyvers to execute to H. M. Barney as Trustee of said bankrupt estate a quit claim deed conveying to said trustee all the properties claimed by the said Mike Lyvers in his intervention.

It appears from the testimony and the record

1. That the said Mike Lyvers filed his intervention before the Referee claiming the property described therein as his own personal property.

2. That H. M. Barney as Trustee for the Bankrupt estate filed his response to the intervention of Mike Lyvers and denied the allegations of ownership of Mike Lyvers.

3. That on the same day the said H. M. Barney as trustee of said bankrupt estate filed a petition in the same case for a summary order against Mike Lyvers requiring him to convey to the Trustee all the properties claimed by said Mike Lyvers in his intervention.

4. That after the filing of said petition for a summary order Mike Lyvers moved to dismiss his intervention which was denied by the Referee.

5. That the Referee then proceeded to hear the testimony as to the ownership of the property and upon the testimony found that said Mike Lyvers was not the owner thereof, but that it belonged to the bankrupt estate.

46 6. The only point involved is whether the Referee had jurisdiction to make the order upon said Mike Lyvers.

The court finds as a matter of law that the said Referee did have such jurisdiction. It is therefore by the court considered, ordered and adjudged that the order of the Referee requiring Mike Lyvers to convey to H. M. Barney, Trustee of the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, by a

quit claim deed for all of the property described in the intervention of said Mike Lyvers be affirmed.

FRANK A. YOUMANS,
Judge.

Certificate.

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of an order of said court in the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, No. 674 *in Bankruptcy, entered April 23,* 1924, as the same appears of record in my said office in the Texarkana Division of said District.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at office in the city of Texarkana, Arkansas, this 21st day of May, 1924.

(Seal) (Sgd.) WM. S. WELLSHEAR,
Clerk.

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47 Petition for Review of Referee's Order.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt.

No. 674.

Now comes Mike Lyvers for the purpose of excepting to the jurisdiction of the referee herein to hear and determine a summary proceeding against him to require him to execute deeds of properties described in trustee's petition to said trustee, H. M. Barney, for the reason that no law and no consent can vest jurisdiction in the referee of a proceeding of this nature, but such proceeding must be instituted before a proper court.

And reserving all rights under above exception, your petitioner, Mike Lyvers, respectfully shows that on the 6th day of March, 1924, an order, a copy of which is hereto annexed, was made and entered herein; that said order was erroneous for the following reasons:

I.

It appears that Mike Lyvers filed a plea of intervention objecting to the sale of certain properties by the trustee of the bankrupt, and setting up title to and claiming all of the

properties shown in Exhibit A attached to the said petition of intervention filed by the said Mike L. Lyvers, to which the trustee made reply in effect denying the material allegations of the petition of intervention so filed by the said Mike L. Lyvers, praying for said petition of Mike L. Lyvers be disallowed, held for naught and that the Trustee recover costs. That thereafter, although after some testimony had been heard, the said Mike L. Lyvers ...

That the said Mike Lyvers Syndicate sold or caused to be sold certificates of interest or shares to various persons in the approximate sum of $205,000. That numerous per-
48 sons purchased certificates representing interest in the said trust estate, paying their money for said certificates and receiving certificates of shares in proportion to the amount paid in by each, amounting in the aggregate to approximately the sum of $205,000 as aforesaid. That out of the proceeds of the sale of such certificates the properties which the trustee seeks to have and sought, before the Referee in this proceeding, to have the said Mike Lyvers deed over to him, the said Trustee, were purchased and paid for with the moneys derived from the sale of certificates in the said Mike Lyvers Syndicate and thereby became the properties of and belonged to the Mike Lyvers Syndicate, a trust estate, long prior to the bankruptcy, and the said properties were owned by the said trust estate prior to the bankruptcy and at the time of the entry of the order herein, except that said Mike Lyvers did make conveyances to some of said properties to the said Receiver, H. L. Williford, acting under due and legal appointment of the Chancery Court of Union County, Arkansas, said conveyances having been made for the purpose of administration by the said state court receiver in that particular proceeding and for no other purpose. It appears, as your petitioner is advised, that the said Mike Lyvers Syndicate is a distinct and separate organization from that of the bankrupt herein; has and did have prior to the bankruptcy separate shareholders or certificate holders and that the ultimate and beneficial ownership of the properties purchased aforesaid were the proceeds of the sale of certificates in and to the said Mike Lyvers Syndicate was in the said Mike Lyvers Syndicate and Trust Estate and its shareholders and not in the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, and the said Mike Lyvers Syndicate, not having been adjudicated a bankrupt herein, and its shareholders being the equitable owners of all of the said properties, the same are not liable for any of the indebtedness that may be due and owing by the bankrupt and not subject to adminis-

tration as a part of the bankrupt estate as the properties of the said bankrupt, Harry Morris Guaranteed Gusher, No. 3.

II.

49 Said order is erroneous as to the Mike Lyvers Syndicate because the said Mike Lyvers Syndicate and Trust Estate has not been made a party hereto and cited in the manner and form required by law in order to make it a party to this proceedng as a trust estate.

III.

It appears that Mike Lyvers filed a plea of intervention objecting to the sale of certain properties by the Trustee of the bankrupt, and setting up title to and claiming all of the properties shown in Exhibit "A" attached to the said petition of intervention filed by the said Mike Lyvers, to which the trustee made reply in effect denying the material allegations of the petition of intervention so filed by the said Mike Lyvers praying that said petition of Mike Lyvers be disallowed, held for naught and that the Trustee recover costs. That thereafter, although after some testimony had been heard, the said Mike Lyvers filed and presented a motion to the referee for the dismissal of his said petition of intervention so filed herein on the 27th day of February, 1924, which motion the said Referee overruled, or stated at the time that said motion would be overruled, and thereafter proceeded to hear all of the issues and make the order attached hereto as Exhibit "A". That the order so entered by the trustee is erroneous if based upon the plea of intervention so filed by the said Mike Lyvers and the reply thereto filed by the Trustee for that the referee should have sustained the motion to dismiss the said petition of intervention and could not properly thereafter consider the case in so far as the same were made by the said plea of intervention filed by the said Mike Lyvers and the reply thereto filed by the trustee herein, the trustee not having in his reply prayed for affirmative relief, but only that the said petition of intervention be disallowed and held for naught and for costs.

IV.

Said order is erroneous because it appears that the referee was without jurisdiction of the persons of the said
50 Mike Lyvers or of the subject matter involved in this controversy, and without jurisdiction of the Mike Lyvers Syndicate, of which Mike Lyvers was the trustee of a trust estate vested in the said Mike Lyvers Syndicate.

V.

Said order is erroneous in that it appears that the Referee proceeded to hear and try the interventions of Mike Lyvers, Otto L. Morris and the petitions of the Trustee to require interveners to execute deeds of conveyance and motions to dismiss by interveners, and the testimony of F. L. Copeland, Jesse Riggs, Harry G. Miller, F. G. Moran, B. Bender and H. L. Williford, etc., with sufficient previous notice of an intention to bring on for trial and to hear and determine together all of the matters presented and involved in the several pleas of intervention and petition of the trustee.

VI.

The said referee also erred in trying all of the several matters set out in said order together because the same involved separate and distinct issues of fact and of law and were improperly heard together. The petition of intervention filed by said Otto L. Morris was based upon facts different from that of Mike Lyvers and the matters involved between H. L. Williford, Receiver, were different and involved different questions of fact and law to the matters which were involved as between Otto L. Morris and the trustee and Mike Lyvers and the trustee. Likewise the said hearings were mixed up with the general interrogation of witnesses in relationship to the bankrupt estate.

VII.

The Referee erred in holding that all of the property claimed by the intervener, Mike Lyvers, was purchased with funds of the bankrupt derived from the sale of units in the trust estate from Harry Morris Guaranteed Gusher Syndicate No. 3 and that the same was taken in the name of Mike Lyvers and merely held by him for the benefit of the bankrupt and that said Mike Lyvers had no other interest therein.
51 Said holding of the referee was not sustained by the evidence.

VIII.

The testimony on which the Referee apparently based said order was too general, indefinite and uncertain upon which to base a judgment divesting title legally vested in the intervener as Trustee by record title. The testimony of the witness Bender and all others was to a large extent hearsay based upon conclusions of the witnesses, and did not consist of definite, positive statements of fact within the knowledge of the said witnesses of a character sufficient to warrant a judg-

ment divesting the legal title of a third person and vesting the same in the trustee.

IX.

The referee erred in holding that all of the properties referred to in the order belong to a common fund in that there was no sufficient evidence upon which to base this conclusion.

X.

The order of the Referee is erroneous in this, it appeared from the testimony before the referee that the legal title to a part of the properties referred to involved in the controversy between the trustee and Mike Lyvers, had previously been conveyed by the said Mike Lyvers to H. L. Williford, Receiver of Harry Morris Guaranteed Gusher Syndicate No. 3 pending in the Chancery Court of Union County, Arkansas, for the use and benefit of creditors in consideration of the administration of the estate of said receiver in the state Chancery Court of Union County, Arkansas, and for this reason it was not competent for the referee to enter a peremptory order compelling Mike Lyvers to deed the property so previously conveyed to said State Receiver to the Trustee herein,

(a) In that Mike Lyvers was without title and

(b) The same having been so vested in the Receiver of said State Court, it was not competent, proper or the appropriate practice for the Referee to enter such peremptory order tending thereby to interfere with and clash with the prior jurisdiction of the Chancery Court of Union County,
52 Arkansas, without first requiring the trustee to intervene in the cause pending in said Chancery Court for the purpose of procuring an order therefrom for a delivery by said Receiver of the properties vested in him under and by virtue of the action of said Chancery Court in appointing said Receiver and taking over the said properties, and prosecuting his claim to conclusion throughout the state courts.

XI.

Said order is erroneous because it is too general and fails to point out the specific properties the said Mike Lyvers is required to convey.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankrupt Law of 1898 in General Order 27, this the 13th day of March, 1924.

(Sgd.) MIKE LYVERS, Petitioner.

The State of Louisiana,
Parish of Caddo.

I, Mike Lyvers, the petitioner named and described in the foregoing petition, do hereby make solemn oath that the statement of facts therein contained are true and correct according to the best of my knowledge and belief.

(Sgd.) MIKE LYVERS.

Subscribed and sworn to before me this the 13th day of March, 1924.

(Sgd.) MARVIN K. SMITH,
Notary Public, Caddo Parish, La.

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53 Exhibit "G" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

Quit Claim Deed.

Mike Lyvers, Mike Lyvers Syndicate and Mike Lyvers, Trustee,
To
H. M. Barney, Trustee in Bankruptcy of the Estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt.

Know All Men By These Presents: That I, Mike Lyvers, individually, and as Trustee for the Mike Lyvers Syndicate, and also acting herein as Mike Lyvers, Trustee, for and in consideration of One Dollar to me cash in hand paid by H. M. Barney, Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, bankrupt, do hereby grant, sell and quit claim unto the said H. M. Barney, Trustee in Bankruptcy of the Estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, and unto his successors and assigns forever, the following lands lying and being situated in the Counties of Union and Ouachita, State of Arkansas, to-wit:

1. All my right, title and interest in and to that certain oil and gas lease known as the "McAdoo Lease", being the North half (N½) of the Southeast quarter (SE¼) of the Southwest Quarter (SW¼) of Section Ten (10) Township Sixteen (16) South, Range Sixteen (16) West, situated in the County of Union and State of Arkansas.

2. That certain oil and gas lease covering and affecting what is known as the "J. A. Bilyeou lease", being the northwest quarter (NW¼) of the Northwest quarter (NW¼) of Section Nine (9), Township Fifteen (15) South, Range Sixteen (16) West, situated in Union County, Arkansas.

3. That certain oil and gas lease covering and affecting what is known as the "Johnette lease", being the north three-quarters (N¾) of Fifteen (15) acres of the east half
54 (E½) of the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) of Section thirty-three (33), Township Fifteen (15) South, Range Sixteen (16) West, situated in Ouachita County, Arkansas.

This sale includes all buildings, improvements, equipment, appurtenances, machinery and paraphernalia of every kind and character whatsoever, on or belonging to the aforesaid described oil and gas leases, it being my intention to convey all interest appearing in my name, individually and as trustee of the Mike Lyvers Syndicate, and as Mike Lyvers, trustee, wherever situated in the Counties of Union, Ouachita, and Columbia, in the State of Arkansas, or in any county not herein mentioned in the state of Arkansas, for the reason that all properties appearing in my name in the State of Arkansas, were in truth and in fact purchased with the funds of the Harry Morris Guaranteed Gusher Syndicate No. 3, and said properties were placed in my name for convenience only, and are in truth and in fact the properties of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

To Have And To Hold the same unto the said H. M. Barney, Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, and unto his successors and assigns forever.

Witness my hand on this the 13th day of October, A. D. 1924.

MIKE LYVERS SYNDICATE,
By Mike Lyvers, Trustee,
Mike Lyvers, Trustee,
Mike Lyvers.

Acknowledgment.

State of Arkansas,
County of Miller—ss.

Be It Remembered that on this day personally appeared before me, the undersigned, a Notary Public in and for Miller

County, Arkansas, duly commissioned and acting, Mike Lyvers; to me well known as the person whose name appears in the above and foregoing instrument, and acknowledged that he had signed the same for the purposes, uses and considerations, and in the capacities therein mentioned and set forth.

Witness my hand as such Notary Public on this the 13th day of October, A. D. 1924.

(Seal) LOUIS JOSEPHS,
Notary Public in and for Miller County, Arkansas.

My commission expires November 4, 1924.

55 Certificate of Record.

State of Arkansas,
County of Ouachita—ss.

I, Lawrence E. Wilson, Clerk of the Circuit Court and Ex-Officio Recorder for the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 25th day of November, A. D. 1924, at 8 o'clock A. M., and the same is now duly recorded, with the acknowledgment and certificate thereon, in "Record Book 47" page 29.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court, this 26th day of November, A. D. 1924.

(Seal) LAWRENCE E. WILSON,
Clerk.

Certificate of Record.

State of Arkansas,
County of Union—ss.

I, H. G. Williams, Circuit Clerk and Ex-Officio Recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on this the 2nd day of December, A. D. 1924, at 4 o'clock P. M., and that the same is now duly recorded, with the acknowledgments and certificates thereon, in Record Book No. 197, page 247.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of December, 1924.

(Seal) H. G. WILLIAMS,
Clerk.

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56 Exhibit "H" to Plaintiff's Complaint.

Filed in U. S. District Court April 18, 1928.

Assignment of Oil and Gas Lease and Conveyance of Land.

H. M. Barney, Trustee of the Estate of Harry Morris Guaranteed Gusher Syndicate No. 3, and Harry N. Morris, Bankrupts, To 13330 Natural Gas & Petroleum Corporation.

This indenture made this 2nd day of March, 1925, between H. M. Barney, Trustee of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, and Harry N. Morris, Bankrupts, parties of the first part, and the Natural Gas & Petroleum Corporation of El Dorado, Arkansas, party of the second part:

Witnesseth:

That whereas a petition in involuntary bankruptcy was filed in the District Court of the United States for the Western District of Arkansas, on the 20th day of November, 1923, against Harry Morris Guaranteed Gusher Syndicate No. 3, which was supplemented by the intervention of H. H. McHaffey, H. T. Knapp, A. L. Weisinger and C. W. Murphy in said suit, and

Whereas the said Harry Morris Guaranteed Gusher Syndicate No. 3 was duly adjudged a bankrupt on said petition and intervention on the first day of January, 1924, and the said H. M. Barney thereafter was duly appointed trustee of the estate of said bankrupt on the 29th day of January, 1924, and thereafter duly qualified and has continued to act and is now acting as such trustee, and

Whereas a petition of involuntary bankruptcy was filed in the District Court of the United States for the Western District of Arkansas, on the 26th day of November, 1923, against Harry N. Morris, and

Whereas the said Harry N. Morris was duly adjudged a bankrupt on said petition on the 8th day of March, 1924, and the said H. M. Barney thereafter was duly appointed trustee

of the estate of the said bankrupt on the 2nd day of
57 April, 1924, and thereafter duly qualified and has continued to act and is now acting as such trustee, and

Whereas on April 2nd, 1924, by order of Gustavus G. Pope, Esquire, Referee in Bankruptcy, to whom both of the above matters in Bankruptcy were referred, the matter of Harry N. Morris, Bankrupt, No. 677 was consolidated with the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, No. 674, and

Whereas the said H. M. Barney, as Trustee in Bankruptcy of the estates of Harry Morris Guaranteed Gusher Syndicate No. 3 and Harry N. Morris, Bankrupts, was duly authorized, after notice to the mortgage holders, lienors, and creditors, by an order of Gustavus G. Pope, Esquire, Referee in Bankruptcy, dated January 29, 1924, to sell and convey the property hereinafter mentioned, at private sale and free and clear of liens, and

Whereas in pursuance of said order of sale the said H. M. Barney, as Trustee of the estates of Harry Morris Guaranteed Gusher Syndicate No. 3, and Harry N. Morris, bankrupt, sold the property hereafter mentioned to the Natural Gas & Petroleum Corporation on the 23rd day of January, 1925, for the sum of One Hundred and Twenty-five Thousand ($125,000.00) Dollars, which sale was approved by Gustavus G. Pope, Esquire, Referee in Bankruptcy, on the 23rd day of January, 1925, which order of approval authorized and directed H. M. Barney, Trustee, of said Bankrupt estates to execute such conveyance as may be necessary to consummate said sale upon the payment of the purchase price.

Now, therefore, know all men by these presents, that I, H. M. Barney, Trustee of the Estates of Harry Morris Guaranteed Gusher Syndicate No. 3 and Harry N. Morris Bankrupts,
for and in consideration of the sum of One Hundred
58 and Twenty-five Thousand ($125,000.00) Dollars to me in hand paid by the Natural Gas & Petroleum Corporation, the receipt of which is hereby acknowledged, do bargain, sell, assign and convey unto the said Natural Gas & Petroleum Corporation and its successors and assigns forever, all of my right, title and interest to the oil and gas leases particularly described as follows, and to the land covered by them:

1. A certain oil and gas lease made and entered into on the 20th day of December, 1919, by and between W. B. Johnette and Belva Johnette, lessors, and C. H. Murphy, Trustee,

lessee, recorded in Book 79 of the Records of Union County, Arkansas, at page 125, insofar as said lease covers E½ of the SW¼ of the NE¼ of Section 33, Township 15 South, Range 16 West, Union County, Arkansas.

2. A certain oil and gas lease made and entered into on the 26th day of August, 1920, by and between Louis Herbert Roseman, lessor, and C. H. Murphy, lessee, recorded in Book 89 of the Records of Union County, Arkansas, at page 56, insofar as said lease covers E½ of the SW¼ of the NE¼ of Section 33, Township 15 South, Range 16 West, Union County, Arkansas.

3. A certain oil and gas lease made and entered into on the 19th day of May, 1922, by and between J. A. Bilyeu and M. D. Bilyeu, lessors, and J. W. Olvey, lessee, recorded in Book 133 of the Records of Union County, Arkansas, at page 425, which lease covers NW¼ of the NW¼ of Section 9, Township 16 South, Range 15, West, Union County, Arkansas.

4. A certain oil and gas lease made and entered into on the 17th day of August, 1922, by and between B. T. Laney and Martha Laney, lessors and Pat Marr, Trustee, lessee, recorded in Book 11 of the Records of Ouachita County, Arkansas, at page 406, insofar as said lease covers E½ of NW¼ of SE¼ of Section 31, Township 15 South, Range 15 West, Ouachita County, Arkansas.

5. Certain oil and gas leases made and entered into on the 14th and 24th day of March, 1923, by and between C. F. Mullens, Mary Mullens, his wife, V. V. Mullens, and Martha Mullens, lessors, and Otto L. Morris, lessee, recorded in Book 22 of the Records of Ouachita County, Arkansas, at page 286, and in Book 22, page 330, which leases cover: S½ of SW¼ of NW¼ of Section 27, Township 15 South, Range 16 West, Ouachita County, Arkansas, except the following tract or parcel of land thereof, to-wit:

59

Commencing at the Half Mile point between Sections 27 and 28 and running thence north 462 feet; thence east 759 feet to a branch; thence in a southerly direction along the line of said branch to the north line of the NW¼ of the NW¼ of said Section 27; thence west along the line of said last described quarter section to point of beginning.

(In addition to the above there were 49 other pieces of property, not involved in this litigation, included in this instrument).

Further and for the same consideration, I, H. M. Barney, Trustee as aforesaid, do bargain, sell, assign and convey unto the Natural Gas & Petroleum Corporation and to its successors and assigns forever, all my right, title and interest to any oil and gas lease or leases and to any lands wherever situated in the counties of Union and Ouachita, State of Arkansas, and do bargain, sell, assign and convey unto the Natural Gas & Petroleum Corporation and its successors and assigns forever, all of the personal property used, or obtained in connection with any of the oil and gas leases, or lands, hereinbefore described, together with all proceeds of oil or gas produced at any time heretofore, from any of the leases or lands above described and sold therefrom since midnight of January 23, 1925; and all persons or corporations purchasing oil or gas sold from any of said property, as aforesaid, are hereby authorized to pay the proceeds of any sale of said oil or gas so sold since midnight of January 23, 1925, directly to the Natural Gas & Petroleum Corporation.

In witness whereof, I hereunto set my hand and seal on this the 2nd day of March, 1925.

H. M. BARNEY,
Trustee of the Estates of Harry Morris Guaranteed Gusher Syndicate No. 3, and Harry N. Morris, Bankrupts.

60 Acknowledged March 2, 1925, before Guy H. Lambeth, Notary Public, Miller County, Arkansas.

Recorded March 4, 1925 in office of Clerk of Circuit Court and Ex-Officio Recorder, Ouachita County, Arkansas.

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61 Amendment to Complaint.

Filed in U. S. District Court Jan. 2, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al.,
No. 47. vs. In Equity.
Natural Gas & Fuel Corporation.

Now comes plaintiff herein and pursuant to leave granted in the decree of the Circuit Court of Appeals for the Eighth Circuit in this case, amends the bill of complaint hereinbefore filed, by adding the additional paragraphs hereinafter set forth:

Petitioner shows that Mike Lyvers was under indictment at the time the proceedings were taken before the referee and

before the District Court and that on the 13th day of October, 1924, the said Mike Lyvers having pleaded guilty under an indictment alleging conspiracy to defraud unit holders in Mike Lyvers Syndicate and other associations, was under a suspended sentence imposed by Honorable Frank A. Youmans, Judge.

That the unitholders of Mike Lyvers Syndicate were scattered over the United States, none of whom as far as plaintiff could discover, being then or now residents of Arkansas.

Petitioner further shows that the same condition existed until October 25, 1925, when the said Mike Lyvers, designated plaintiff John H. Page as his successor as trustee of Mike Lyvers Syndicate.

Petitioner shows that in December 1925, John H. Page, Trustee for Mike Lyvers Syndicate, filed a suit similar to this one in the United States District Court for the Eastern District of Arkansas. The said Page being a resident of said Eastern District.

Petitioner shows that a plea to the jurisdiction was filed by defendant, which petitioner offered to submit on briefs, but the Honorable Judge of the Eastern District required oral argument.

62 Petitioner shows that he never requested any delays, and defendant did not fix motion for hearing.

Petitioner shows that Honorable H. Smead Powell was in charge of the filing of the said suit in said Eastern District and that shortly after filing said suit the said Powell died, and his associates subsequently withdrew from the suit.

Petitioner shows that John H. Page, trustee, retained the Honorable T. M. Mehaffey, who was shortly thereafter appointed to the Supreme Court of the State of Arkansas, and thereafter placed the case in the hands of E. L. McHaney, who was also shortly thereafter appointed to the Supreme Bench of Arkansas.

That the said John H. Page finally secured the services of the firm of Carmichael and Hendricks, of Little Rock, Arkansas, and as soon thereafter as it could be fixed, a plea to the jurisdiction filed by the National Gas & Fuel Corporation, was argued, after delay asked by defendant, before the Judge of the Eastern District, and sustained by him.

Petitioner shows that at the time there was pending in the Supreme Court of the United States a case involving the

question of jurisdiction and the appeal from the decision of the District Court was deferred until the Supreme Court of the United States should pass on same, which Supreme Court subsequently did, by a decision similar to that of the Judge of the Eastern District of Arkansas.

Thereafter, it became necessary to secure local lawyers in El Dorado, Arkansas, and after same were employed the present suit was filed in the Chancery Court for Union County, Arkansas, and removed by application of defendant below to the Western District of Arkansas.

Plaintiff shows that efforts were made to secure copies of exhibits to attach to complaint from the Clerk of the Western District of Arkansas, but was informed said exhibits were misplaced, and it became necessary to secure an order from the Judges of the Eastern District of Arkansas for release of the exhibits filed with complaint in his court.

63 That Judge Trieber was absent on account of illness, and a delay was occasioned thereby. That in September, 1927, Judge Trieber died, and after awaiting his successor's appointment thereafter the petition herein was filed without exhibits and orders were not secured for a release of exhibits until after Judge Martineau had qualified in 1928.

Plaintiff further shows that he is informed and believes that the defendant and its predecessor in title took possession of the property and began developments before the court approved the bankruptcy sale, and produced large quantities of oil therefrom previous to October 25th, 1925, when he became trustee.

Petitioner shows that the above amendment does not in any wise change the substance of his complaint, and prays the same as in the prayer as under the original complaint and for all orders needed and for general and equitable relief.

FRANK J. LOONEY,
PUGH, GRIMMET & BOATNER,
J. M. GRIMMET,
McNALLEY & SELLERS,
Attorneys for Complainant.

State of Arkansas,
County of .....

Personally came and appeared before me, the undersigned authority, John H. Page, trustee, who first being duly sworn, deposes and says:

That he has read the foregoing amended bill of complaint, and the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief.

.....

Sworn to and subscribed before me, on this the .... day of ....., 19....

.....
Notary Public.

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64 Answer of Arkansas Natural Gas Corporation.

Filed in U. S. District Court January 18, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al., Plaintiffs,

vs.

Natural Gas & Fuel Corporation, Defendant.

I.

Comes the Arkansas Natural Gas Corporation and states that it is a corporation organized under the laws of the State of Delaware and a citizen and resident of that state, and further states that since the commencement of this action, the original defendant, Natural Gas & Fuel Corporation, by proper proceedings under the laws of the State of Delaware, has become merged into said Arkansas Natural Gas Corporation. That the Arkansas Natural Gas Corporation is the owner of all the assets of the Natural Gas & Fuel Corporation, including the right, title and interest of said Natural Gas & Fuel Corporation in and to the property involved in this proceeding and in and to the controversy involved herein, and that it is subject to all of the liabilities of said Natural Gas & Fuel Corporation, including that alleged to exist by the plaintiff in this proceeding. That the identity of the said Natural Gas & Fuel Corporation is now merged into the Arkansas Natural Gas Corporation, which said corporation prays that it be made party defendant in this action, in lieu of the Natural Gas & Fuel Corporation, and that it have leave to file this its answer as follows:

II.

Defendant denies that on February 3, 1923, or at any other time, Mike Lyvers Syndicate was organized as a trust estate under any law of the State of Arkansas or that in pursuance of any law of said state it filed for record on February 22,

1923, or at any other time, any declaration of trust, and denies that said syndicate acting by or through Mike Lyvers as trustee, or in any other way, acquired on April 26, 1923, or at any other time, any ownership, beneficial or other-
65 wise, in or to any oil or gas lease covering the West Half of the Northwest Quarter of the Northwest Quarter of Section 9, Township 16 South, Range 15 West, Union County, Arkansas, or that on July 2, 1923, or any other date, said syndicate acquired any ownership, beneficial or otherwise, in and to any oil, gas and mineral lease covering the East Half of the Northwest Quarter of the Northwest Quarter of Section 9, Township 16 South, Range 15 West, Union County, Arkansas, and denies that said syndicate ever acquired or held any interest or ownership, beneficial or otherwise, in or to any oil, gas and mineral lease upon either of said tracts of said land.

III.

Defendant admits that Harry Morris Guaranteed Gusher Syndicate No. 3 was adjudicated a bankrupt in the Texarkana Division of the United States District Court for the Western District of Arkansas, and admits that during the pendency of said bankruptcy proceedings Mike Lyvers filed in said proceedings an intervention, claiming to be the owner of the aforesaid oil, gas and mineral leases covering the property above described, but defendant denies that said intervention was filed merely in a personal capacity, but to the contrary alleges that said intervention was in truth and in fact filed by the said Mike Lyvers as Trustee for the Mike Lyvers Syndicate and on behalf of said syndicate, and that at the hearing upon said intervention said property was claimed by Mike Lyvers for and on behalf of said syndicate and in his capacity as Trustee therefor.

IV.

Defendant admits that on the hearing before the Referee in Bankruptcy of the aforesaid petition the issue of the ownership of said oil, gas and mineral leases was decided adversely to the contention of Mike Lyvers, and that it was held by the Referee that the ownership to said property was and should be in the Trustee of the bankrupt estate of Harry Morris Guaranteed Gusher Syndicate No. 3, and that an order was entered by said Referee requiring Mike Lyvers to execute conveyances transferring said leases to the Trustee in Bankruptcy, H. M. Barney. Defendant admits that on
66 April 23, 1924, upon petition for review of said order of the referee, the Hon. Frank A. Youmans, Judge of the United States District Court for the Western District of

Arkansas sustained the finding and order of the Referee to the effect that the ownership of said oil, gas and mineral leases was and should be in the Trustee of said bankrupt estate, and requiring the said Mike Lyvers to convey said property to said trustee.

V.

Defendant admits that on October 13, 1924, the said Mike Lyvers executed and delivered to the said H. M. Barney, as trustee, a quit claim deed conveying to H. M. Barney, as trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, bankrupt, all right, title and interest in and to said oil, gas and mineral leases, and that said deed was signed and executed by Mike Lyvers Syndicate by Mike Lyvers, Trustee, Mike Lyvers, Trustee, and Mike Lyvers. In this connection, defendant denies that the said Mike Lyvers executed said quitclaim deed at the instance of the said H. M. Barney as Trustee in Bankruptcy, and denies that said deed was never ordered by the court or Judge thereof to be executed by said Mike Lyvers as trustee for the Mike Lyvers Syndicate, but to the contrary states that in truth and in fact the true purpose and intent of said order or orders was to require said deed to be executed by Mike Lyvers as the trustee and representative of Mike Lyvers Syndicate, and that the execution of the same was purely voluntary on the part of Mike Lyvers, because he knew he was thereby carrying out the true intent and purpose of said orders and was made wholly without imposition or duress. In this connection, defendant also denies that the said bankrupt estate never had or owned any right, title or interest in and to the said leases covering the forty acres of land hereinbefore described.

67

VI.

Defendant admits that under an order of the Bankrupt Court entered January 29, 1925, H. M. Barney, as Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, sold and conveyed by deed executed March 2, 1925, to Natural Gas & Petroleum Corporation all right, title and interest in and to the aforesaid oil, gas and mineral leases, together with other oil, gas and mineral leases owned by said bankrupt estate, which said conveyance is recorded in Union County, Arkansas, in Record Book 201, page 369, and in this connection, defendant states that the Natural Gas & Petroleum Corporation paid for such conveyance and for the leases therein contained the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00). Defendant denies that at

the time of the execution of said conveyance to it, the said Natural Gas & Petroleum Corporation was advised or had any reason to believe that said leases covering the Northwest Quarter of the Northwest Quarter of Section 9, Township 16 South, Range 15 West, were the property of Mike Lyvers Syndicate, but on the other hand, defendant states that said Natural Gas & Petroleum Corporation at the time of said purchase was an innocent purchaser and paid a full consideration for said property, and was without notice or knowledge of any defects whatsoever in the title of the trustee in bankruptcy.

VII.

Defendant in the foregoing connection alleges that subsequent to the execution by Mike Lyvers, as trustee, of the quitclaim deed of October 13, 1924, to H. M. Barney as trustee in Bankruptcy, the said Mike Lyvers, as Trustee for Mike Lyvers Syndicate, voluntarily executed and delivered another quitclaim deed covering said leases to Barney as Trustee, said deed being dated the 20th day of February, 1925.

VIII.

Defendant has no information as to the number or amount of certificates of interest that were sold in the Mike Lyvers Syndicate or as to the amount of money paid to Mike Lyvers, as Trustee, and therefore denies that said syndicate was organized for the benefit of certificate holders holding certificates of interest to the amount of approximately
68 Two Hundred Thousand Dollars ($200,000.00), or that that sum or any other sum was paid to Mike Lyvers as Trustee of said syndicate; and defendant denies that the holders of such certificates are the equitable holders of the aforesaid leases, and denies that the Mike Lyvers Syndicate at no time owed any obligation of any kind or character to Harry Morris Guaranteed Gusher Syndicate No. 3 to convey said leases to said Guaranteed Gusher Syndicate.

IX.

Defendant admits that subsequent to the conveyance to the Natural Gas & Petroleum Corporation by H. M. Barney, Trustee in Bankruptcy, the Natural Gas & Petroleum Corporation and its successor the Natural Gas & Fuel Corporation went upon and took possession of said leases, sunk wells upon and developed the same, at large expense, and that it has since produced oil from said leases, but denies that it has converted to its own use any oil or the proceeds thereof be-

longing to the plaintiffs herein, and denies that it has produced or sold oil from said leases to the amount of Five Hundred Thousand Dollars ($500,000.00).

X.

Defendant denies that on October 25, 1925, or on any other date Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, in accordance with any authority vested in him by the declaration of trust of said syndicate, designated the plaintiff John H. Page, as Trustee of said estate and as his successor, and denies in this connection that the said John H. Page is in law or equity the trustee of the estate of said syndicate, or holds any interest or title in and to any of the properties of said estate, or is in any way empowered to act on its behalf.

XI.

Further answering, defendant states that the Harry Morris Guaranteed Gusher Syndicate No. 3 was organized prior to the organization of Mike Lyvers Syndicate. That both syndicates were promoted and organized by the same parties, to-wit, Harry Morris, Otto Morris and Dave Morris, and that the affairs of both were conducted at all times by those
69 parties. That the money belonging to both syndicates was handled and administered by said parties and the affairs of both syndicates conducted as one concern, title to the various properties acquired being taken sometimes in the name of one syndicate and sometimes in the name of the other. That the moneys and the affairs of said syndicates were not kept or administered separately, but were confused and commingled and that the properties taken in the name of the two belonged to a common fund and were treated as so belonging. That the said syndicate were merged, controlled and operated by the same management and by the employees of Harry Morris Guaranteed Gusher Syndicate No. 3, who had control over the books and affairs of said concerns, and in this connection, defendant denies that the aforesaid oil and gas leases were purchased with funds belonging to the Mike Lyvers Syndicate or to the unit holders thereof.

XII.

In this connection, defendant states that on or about the 29th day of August, 1923, at the instance of Bender Iron & Supply Company, and other creditors, the Harry Morris Guaranteed Gusher Syndicate No. 3 was under an order of the Chancery Court of Union County, Arkansas, placed in the hands of H. L. Williford, as Receiver; that in the course of

the administration by said Receiver it became impossible to separate the affairs of said syndicates, and that in order to administer the same as a whole, the said Mike Lyvers as trustee executed a deed to said receiver, conveying to him as receiver the producing properties of Mike Lyvers Syndicate. That thereafter the affairs and assets of the Harry Morris Guaranteed Gusher Syndicate No. 3 were, under proper court procedure and orders, removed from the jurisdiction of the Union Chancery Court and of its receiver, and were placed in the custody of the United States District Court for the Western District of Arkansas, sitting in bankruptcy, and that all of said bankrupt estate and assets came into the possession of the aforesaid H. M. Barney, as Trustee in Bankruptcy,
70 who by reason of the facts above stated was forced to treat and administered the affairs of said syndicate as a whole, holding the assets and effects standing in the name of the Mike Lyvers Syndicate as the property of the bankrupt estate of Harry Morris Guaranteed Gusher Syndicate No. 3, and who treated the unit holders of the respective two syndicates without distinction between them as deferred creditors in bankruptcy.

XIII.

In the above connection, defendant states that in the course of the administration of said bankrupt estate, Gustavus G. Pope, as Referee in Bankruptcy, did on the .... day of ..... 192...., mail to the unit holders of Mike Lyvers Syndicate notices to the effect that the affairs of the Harry Morris Guaranteed Gusher Syndicate No. 3 and its assets, including such leases and property as stood in the name of Mike Lyvers Syndicate, were being administered in bankruptcy and notifying them, the said unitholders, to file their claims as deferred creditors in bankruptcy. A copy of said notice is hereby attached as Exhibit "A" to this answer. A large number of said unit holders thereupon filed claims in said bankruptcy on the basis of their certificates of ownership being a claim against the estate for the par value thereof, and said claims were allowed and a dividend was paid thereon to each of said unitholders.

XIV.

Defendant states that the intervention referred to in the complaint herein as having been filed by Mike Lyvers in the aforesaid bankruptcy proceedings, claiming to be the owner of the oil, gas and mineral leases hereinabove described, was filed on the ..... day of ....., 1924, and that the order of the Referee denying the same and requiring said

Mike Lyvers to execute conveyances transferring the legal title to said property to the trustee in bankruptcy, was entered March 6, 1924; that on April 23, 1924, the petition of Mike Lyvers for a review of said order of the Referee was heard by the Hon. Frank A. Youmans sitting as the
71. District Court, and on said date an order was entered by the said court affirming the order of the Referee. Copies of the petition of Mike Lyvers and the ones of the Referee and the court are attached to the complaint herein; and defendant hereto attaches as Exhibits "B" and "C" the petition in response filed by H. M. Barney as Trustee, and the petition filed by him for a summary order of Mike Lyvers. In this connection, defendant states and avers that while it is true that the said petition of Mike Lyvers and the said orders of the Referee and of the District Court on their face did not formally mention or refer to him as trustee of the Mike Lyvers Syndicate, yet in truth and in fact said petition was filed by the said Mike Lyvers as Trustee for the Mike Lyvers Syndicate, all of the proof at the hearing was upon the issue as to whether or not said leases were the property of Mike Lyvers as Trustee for the Mike Lyvers Syndicate, and not of Mike Lyvers personally, and at no time did Mike Lyvers at said hearing claim said properties other than as Trustee for the Mike Lyvers Syndicate. That while the said pleadings and orders did not refer to Mike Lyvers as Trustee, yet in truth and in fact he acted as Trustee in the filing of said petition, and at said hearing claimed the property as trustee for the Mike Lyvers Syndicate, and the true intent and purpose of the order of the referee and of the District Court affirming same was to adjudicate the title to said property to be in the bankrupt estate of Mike Lyvers as Trustee for Mike Lyvers Syndicate, and to require the said Mike Lyvers to convey as Trustee for Mike Lyvers Syndicate to the Trustee in Bankruptcy.

XV.

Defendant accordingly states that the said quit claim deed thereafter executed by Mike Lyvers, as Trustee for Mike Lyvers Syndicate, was in accordance with and carried out the true intent and spirit of said orders, and the defendant here-
upon pleads the aforesaid entire proceeding, consist-
72 ing of the petition of Mike Lyvers, petition of the trustee in bankruptcy, the testimony at said hearing, and orders of the Referee and of the District Court at res adjudicata upon all of the issues involved in this case as between this defendant and the complainants herein, and states

that the complainants are now by reason thereof estopped to further litigate said issues.

Defendant states that in 1925, L. J. Zug, F. O. Wilson and Joseph P. Zimmer filed an intervention before Gustavus G. Pope, the Referee in Bankruptcy in the bankruptcy proceedings of Harry Morris Guaranteed Gusher Syndicate No. 3, a copy of which intervention is hereto attached as Exhibit "D"; that the said L. J. Zug, F. O. Wilson and Joseph P. Zimmer were owners of beneficial interest certificates, or unit holders, in Mike Lyvers Syndicate, and that as such they intervened and in said petition claimed and asserted title to said oil and gas leases to be in Mike Lyvers Syndicate, pleaded that the bankrupt estate had never had any interest or ownership in same, and asked that the conveyance of said leases executed March 2, 1925, by H. M. Barney, as Trustee, under the order of the Bankruptcy Court, to the Natural Gas & Petroleum Company, be set aside and that title to said property be vested in Mike Lyvers Syndicate. That on or about March 18, 1925, H. M. Barney, as Trustee, filed his response to said intervention, a copy of which response is hereto attached as Exhibit "E", and on March 18, 1925, the said Referee in Bankruptcy, Gustavus G. Pope, entered an order denying said intervention and refusing to set aside said sale. A copy of said order is hereto attached as Exhibit "F".

Defendant states that the said interveners, L. J. Zug, F. O. Wilson and Joseph P. Zimmer, filed said petition as holders of beneficial units of interest in Mike Lyvers Syndicate for and on behalf of themselves and all other unit holders, and that in so filing the same they acted as representatives of all of the unit holders of said syndicate, all of whom became bound by such judgment or order as might be entered thereon. Defendant further states in this connection that
73 no appeal or review was ever taken from the aforesaid order of the referee on said petition and that same became final and binding upon the said Mike Lyvers Syndicate and all of its unitholders, and now constitutes res adjudicata as between this defendant and the plaintiffs herein upon all of the issues sought to be litigated in this action, and defendant so pleads said proceeding and order of the Referee and states that the plaintiff is now estopped to further litigate the issues sought to be litigated in this proceeding.

Defendant states that shortly after the denial of the aforesaid petition of Zug, et al., the Natural Gas & Petroleum Corporation went into possession of the property covered by the

aforesaid leases, which property and leases defendant states up to that time was in unproductive and undeveloped territory and of small value, not exceeding the aggregate sum of Five Hundred Dollars ($500.00) or One Thousand Dollars ($1000.00). That said Natural Gas & Petroleum Corporation and its grantee the Natural Gas & Fuel Corporation began exploration towards the operation and development of said leases, and spent large sums of money in exploring and in the drilling of wells; that as a result of said development work and expenditure of money five producing oil wells were brought in by said company, and the value of said leases was enhanced from relatively nothing to a large amount. That the successful development of these leases, and all other leases in the neighborhood thereof, caused the development of a new oil fild near El Dorado, thereby greatly enhancing the value of the whole of said territory as an oil field. That the development of said new territory was publicly broadcast over the United States and gained great notoriety, and that said development therefore became known to the unit holders of the Mike Lyvers Syndicate. That notice of the sale of said leases by the trustee in bankruptcy to the Natural Gas & Petroleum Corporation was had by the unit holders of Mike Lyvers Syndicate as well as by Mike Lyvers himself, as trustee,
74 but notwithstanding the same, no action was taken by them or any one on their behalf to assert any rights to said property until after the property had been developed and its value greatly increased and enhanced by the industry and at the expense of the Natural Gas & Fuel Corporation. No action whatever was taken on behalf of said Mike Lyvers Syndicate or its unitholders until January 9, 1926, when a suit similar to the one at bar was filed by John H. Page, claiming to be trustee for said syndicate against Natural Gas & Fuel Corporation, as successor of Natural Gas & Petroleum Corporation, in the Federal District Court sitting at Little Rock, although in the meantime the development of said leases had gone ahead rapidly and large sums of money had been spent by the Natural Gas & Petroleum Corporation and Natural Gas & Fuel Corporation in the development and operation of the same, said suit was dismissed by order of the court for lack of jurisdiction on the 18th day of April, 1927, and no further action was taken on behalf of said Mike Lyvers Syndicate or the unitholders thereof by any one until the institution of this proceeding on December 20, 1927, by the said John H. Page, again claiming to be trustee for Mike Lyvers Syndicate, although in the meantime the exploration and operation of said leases and production of oil therefrom had been going on steadily.

Defendant accordingly states that it would be inequitable and unjust to allow the Mike Lyvers Syndicate, or the unit-holders thereof, or any one representing them, after having stood by and allowed defendant's predecessors to explore and develop said leases at great expense and at their own risk, and after they have produced oil therefrom and many times enhanced the value thereof, to now assert title to the property, and defendant states that the said plaintiffs and the unit-holders thereof, by their conduct have been guilty of such laches as to estop them from now maintaining this suit.

Premises considered, defendant prays that the prayer for relief contained in plaintiff's bill of complaint herein be in all things denied, and that the said bill of complaint be dismissed for want of equity and for all other and further relief to
75 which defendant may be entitled in the premises.

MOORE, GRAY & BURROW,
JEFF DAVIS,
Attorneys for Defendant.

Exhibit "A"

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of The Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt. No. 674,677.

Under the orders of the bankrupt court all holders of certificates of the Harry Morris Guaranteed Gusher Syndicate No. 3, and the Mike Lyvers Syndicate are creditors in this manner. Proofs of claim in the form prescribed by the Supreme Court, with the certificates attached, must be filed with the referee within one year from the adjudication. You have only a short time in which to do this. The proceeds of the assets will be distributed pro rata only to those whose claims are filed and allowed. No one else will receive any part of the distribution. The proofs should be made by the holders at the time the petition in bankruptcy was filed on Nov. 19, 1923. No reorganization committee has any connection whatever with the bankrupt court, and the claims of holders of certificates must be filed with the referee in bankruptcy at this office in Texarkana, Arkansas, either direct or through attorney on or before Dec. 23, 1924, to have any standing whatever in the distribution of the assets.

GUSTAVUS G. POPE,
Referee in Bankruptcy,
Texarkana, Arkansas.

76 (On face of postcard)

After five days return to
Gustavus G. Pope,
Referee in Bankruptcy,
Texarkana, Arkansas.

Department of Justice
United States District Court
Texarkana Division, West.
Dist. Ark. Official Business.
Penalty for Private Use
$300.

Exhibit "B".

Response to Intervention of Mike Lyvers.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, Bankrupt.

Now comes H. M. Barney, Trustee in Bankruptcy of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and for his response to the intervention filed herein by Mike Lyvers for an order directing the trustee to turn over to said Mike Lyvers possession of certain oil and gas leases, alleges and says:

That the said H. M. Barney is the duly elected, qualified and acting trustee in bankruptcy of said bankrupt estate. Said trustee admits that he has taken possession of and is claiming as the trustee of said bankrupt estate the said oil and gas lease set out in Exhibit "A" of said intervention of the said Mike Lyvers, but denies that the said Mike Lyvers is the owner of said oil and gas leases, or has any interest therein whatsoever.

Said trustee admits that an order has been issued out of this court directing him to sell said oil and gas leases, and that he will sell said oil and gas leases as the property of the said bankrupt estate as directed in the order of sale of said court, but denies that said sale occurred on February 8, 1924, in the city of El Dorado, Union County, Arkansas.

Said trustee denies that the said Mike Lyvers is the owner
of the oil and gas leases and the personal property sit-
77 uated on the land mentioned thereunder, and the per-
sonal property used in connection with the operation

of the oil wells, supplies, furnishings, casings, etc., shown on Exhibit "A" to said intervention and petition of the said Mike Lyvers; and denies that the said trustee should be required to turn over to s. . Mike Lyvers possession of any of said property.

Wherefore, said trustee prays that said intervention and petition be denied and held for naught, and that he have and recover his costs herein expended, and for other relief to which in law or equity he may be entitled.

(Signed) H. M. BARNEY,
Trustee in Bankruptcy of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, Bankrupt.

Keeney and Dimitry,
W. A. Spears,
Will Steel,
Attorneys for Trustee.

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78 Exhibit "C"

Petition for Summary Order Requiring Mike Lyvers to Execute Quit Claim Deed to Trustee Conveying Certain Oil and Gas Leases.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, Bankrupt.

Comes H. M. Barney, Trustee in Bankruptcy of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, Bankrupt, and for his petition for summary order directing Mike Lyvers to execute to said trustee a quit claim deed to certain oil and gas leases hereinafter described, alleges and says:

That the said H. M. Barney is the duly elected, qualified and acting trustee in bankruptcy of said bankrupt estate; that he is the owner and in possession of the following oil and gas leases situated in Union County, Arkansas, to-wit:

One (1) well, McAdoo Lease, N½ SE¼, 10 acres, Sec. 10-16-16. Interest 7/16 until $15,000.00 has been paid out of 7/16 first oil run before out interest will be 7/8 (well Drg.) ¼ interest.

J. A. Bilyeo Farm, 40 a; NW¼ NW¼ Sec. 9-16-15, Our Int. 7/16 until $16,000.00 is paid from 7/.6¾. This lease is in Union County, Arkansas, and is owned by Mike Lyvers.

N¾ or 15 acres of E½ of SW¼ of NE¼ 33-15-16. Three producing wells, all equipment, Union County, South 10 acres of E 22½ acres of North 32½ acres, NE¼ SE¼ 29-15-16.

Your petitioner shows that said oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate, and that said leases were taken in the name of Mike Lyvers, but that the said Mike Lyvers only took and held as trustee for the benefit of said trust estate, the bankrupt herein.

Your petitioner shows that the said Mike Lyvers did not pay out and had no funds with which to pay for said leases, but that he at said times was in the employ of Harry Morris as trustee under the declaration of trust of the assets
79 of this bankrupt estate, and that in placing and taking said leases in the name of said Mike Lyvers that the same was done under a breach of trust of said Harry N. Morris under his declaration of trust agreement. That the said Mike Lyvers does not now and has not at any time owned any interest in said leases, and that your trustee is entitled to an order out of this court directing him to execute a quit claim deed to said leases to said trustee in bankruptcy, a copy of which deed is hereto attached and submitted to this court for its approval.

That your petitioner is entitled to an order out of this court directing the said Mike Lyvers to appear before it at such time and place as it may deem proper and expedient, and then execute said quit claim deed to said oil and gas lease to this trustee, and show cause, if any he have, at said time and place why said deed should not be executed; and failing so to do, that the said Mike Lyvers be committed for contempt of said order directing him to execute said deed.

Your petitioner shows that the said Mike Lyvers had filed an intervention herein for said oil and gas leases and has voluntarily submitted himself to the jurisdiction of this court, and is now subject to the orders of this court.

Wherefore, premises considered, your petitioner prays that the said Mike Lyvers be cited to appear before this court at such time and place as the court may deem proper and expedient and show cause, if any he have, why an order should not be made directing him to execute said deed; and failing so

to do, why he should not be committed for contempt by reason of such failure; and prays for recovery of his costs herein expended, and for all other relief to which said trustee may be entitled.

(Sgd.) H. M. BARNEY,
Trustee in Bankruptcy of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, Bankrupt.

Keeney and Dimitry,
W. A. Spears,
Will Steel,
Attorneys for Trustee.

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80 Exhibit "D".

(Petition of Intervention of L. J. Zug, et al.)

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In Re: Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris,—In Bankruptcy.

H. M. Barney, Trustee in Bankruptcy.

Nos. 674 and 677.

To The Honorable Gustavus G. Pope, Referee in Bankruptcy:

Now come L. J. Zug, F. O. Wilson and Joseph P. Zimmer by their attorney, R. M. Hutchins and respectfully beg leave to be heard in this cause and for their reason respectfully state:

I.

That the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, are trust estates, wherein one Mike Lyvers so called is the sole trustee; that said trust estates were constituted by Declaration of Trust, dated the 21st day of February, 1923, recorded in the Circuit Clerk's office in El Dorado, Arkansas, in Book 157, at page 235, a copy of said Declaration of Trust is attached hreeto, marked "Exhibit "A", and made a part hereof.

II.

That under the terms of said Declaration of Trust constituting said trust estates, there were created certain beneficial trust interests under the title of cestui que trustants, com-

monly known as unitholders; that said beneficial interests were in the denomination of Ten Dollars ($10.00) each, and the ownership thereof was evidenced by certificates of units, the par or face value of which represented the number of ten dollar ($10.00) units or interests purchased in said estate, or the amounts respectfully contributed by such so-called
81 cestui que trustants or unitholders to the corpus of said estate.

III.

That your petitioners are duly constituted unitholders in said estate, as is evidenced by so called certificates of interest therein as follows:

Name	Town	Date	Cert.	Amt.
L. J. Zug	Lebanon Co., Penn.			
R. O. Wilson,	San Antonio, Tex.	2/10/23	#1121	$100.00
Joseph P. Zimmer	Cook Co., Ill.	1/29/23	# 178	30.00
		2/ 6/23	# 533	20.00

Petitioners appear for themselves and on behalf of all persons similarly situated.

IV.

That the business of said trust estate was the buying and selling of oil and gas leases and the development of leases for oil and gas, and the production of oil and gas from oil and gas leases; that the field of activity of said trust estates was in Union and Ouachita Counties in the State of Arkansas.

V.

That the business of said trust estates was carried on in the name of Mike Lyvers, Trustee, and that the title to the assets of said trust estates was in said Mike Lyvers, Trustee, for the benefit of the so-called cestui que trustants, as in the Declaration of Trust provided; that the said Mike Lyvers for the business of said trust estates had an office, or domicile, in the Post Office Block, a building located in the city of El Dorado, Arkansas, and that said office aforesaid was the commonly known domicile or place of business of said estate, and that the location of same was of common knowledge in the community at all times prior to the 23rd day of November, 1923.

VI.

That your petitioners are informed and believe, and on such information allege that said trust estates were in-
82 tegral and independent entities, and that the business of said trust estates in buying, selling, developing and operating oil and gas leases was an independent business and had no legal connection with any other similar trust estate or corporation or partnership or individual so engaged in the same or allied business, but that for convenience and economy of operation your petitioners are informed and verily believe, and on such information so allege that there was a working arrangement between the said Mike Lyvers and one Harry N. Morris, who was in turn the trustee of a trust estate under the name and style of the Harry Morris Guaranteed Gusher No. 3, Harry N. Morris, Trustee, but that said working arrangement was in no way a pooling of interests for common profit or liability, nor an agreement of suretyship or responsibility, nor did it constitute an assumption of liability of one trustee for the debts or liabilities of the other trustee. That each trustee and their respective trust estates were alone and solely responsible and liable for their own debts and liabilities, and that the only purpose of the intangible working arrangement was economy of operation and convenience.

That under such arrangement the trust estates of Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, did not either by affirmation, act, acquiescence or otherwise assume for said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, any liability of any kind or character whatsoever, nor did the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, hold out or present to the business world, or permit to be held out and advertised or stated to the business world that said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, or their estates were directly or indirectly chargeable with the debts and liabilities of Harry N. Morris or the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

83 That Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, were alone and solely responsible for their own debts and liabilities and only their own debts and liabilities were chargeable against their property or properties, and that their debts and liabilities in turn were not chargeable against any other properties whatsoever, including the properties of Harry N. Morris and Harry Mor-

ris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

VI.

That on or about the 29th day of August, 1923, a receiver was appointed by the Honorable George M. LeCroy, Chancellor of the Second Division of the Chancery Court of Union County, Arkansas, of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, at the instance of Bender Iron & Supply Company and other creditors; that W. H. Williford was appointed as such receiver and duly qualified and took charge of the assets of said Harry Morris Guaranteed Gusher Syndicate No. 3; that at the time of said appointment of said Williford as said receiver the operating leases of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers Trustee, were being operated by the Harry Morris Guaranteed Gusher Syndicate No. 3 for the purpose of economy in operation as heretofore set out, and that in taking over possession of the properties of the Harry Morris Guaranteed Gusher Syndicate No. 3, said Williford, as receiver, came into possession of the leases owned by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, were not named as defendants in said suits against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, nor were the commercial debts and liabilities of said Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers Trustee then owing, other than the current monthly expenses for their proportion of the operating costs under their mutual working arrangement, as hereinbefore stated.

That said Williford as receiver continued to operate said operating leases of the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, and received there-
84 from the profits and revenues, and that no accounting was had by said receiver between the Harry Morris Guaranteed Gusher Syndicate No. 3 and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, and your petitioners are informed and believe, and on such information allege, that there was no demand made by said Williford nor attempt made by said Williford, receiver, to secure an accounting, nor to determine the liabilities, if any, then owing by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, to the estate of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, or any other person or persons.

VII.

That during the course of the administration of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, by said Williford as receiver, that said Williford requested of Mike Lyvers, instead of an accounting and a settlement with the said Mike Lyvers, giving to him, the said receiver, security for the operating costs and any undetermined liability that there might be found to be owing by the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, that could be chargeable against the estates of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, then in the hands of said Williford as said receiver, and thereupon the said Mike Lyvers delivered to said Williford, receiver, a deed to the property of said syndicate, to be held by the said Williford, receiver, as such security until such time as a determination might be made of the liability, if any, owing to or that might be charged against the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, by or on behalf of Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee.

VIII.

That on or about the 23rd day of December, 1923, a petition in bankruptcy was filed by Willis B. Cauble, Adelaide Higbee and Harry L. Beard against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, in the United States District Court for the Western
85 District of Arkansas, Texarkana Division, and H. M. Barney was appointed by the honorable court temporary receiver of said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee; that on or about the 30th day of December, 1923, upon answer filed, adjudication was had and the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, was declared bankrupt, and the case referred to Honorable Gustavus G. Pope, one of the referees in bankruptcy for said district. That on or about the 30th day of January, 1924, at a meeting of the creditors, duly called by said referee, H. M. Barney, then the temporary receiver in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, was appointed Trustee in bankruptcy of said bankrupt.

That on or about the ..... day of ..... 19...., a petition in bankruptcy was filed in the United States District Court for the Western District of Arkansas, Texarkana

Division, against Harry Morris personally. An adjudication was had thereon on the ..... day of ..... 19...., and the said Harry N. Morris was adjudicated a bankrupt and the case referred to the Hon. Gustavus G. Pope, one of the referees in bankruptcy for the district, whereupon the Referee consolidated the bankruptcy of Harry N. Morris personally with the bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

IX.

Your petitioners are informed and verily believe, and on such information allege that there has been no petition in bankruptcy filed nor has there been an adjudication in bankruptcy against either the Mike Lyvers Syndicate, Mike Lyvers, Trustee and or Mike Lyvers, Trustee.

X.

That said H. M. Barney, as receiver took over from the said Williford all and sundry, the several leases and other property held by him as receiver, the estate and property of the Harry Morris Guaranteed Gusher Syndicate No. 3, and the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, in the hands of the said Williford, for convenience of operation under the
86 working agreement heretofore herein set out, including the deed given as security by the said Mike Lyvers, Trustee, to hold harmless the said receiver Williford and the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, from loss and damage by the operation of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, in common with the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

Your petitioners are informed and verily believe, and on such information allege that the said H. M. Barney, Trustee in bankruptcy, has operated the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, without an accounting thereof, and without any attempt to make an accounting as between the said Syndicates, Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, with the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and that said Barney, as Trustee, has received the profits and revenue arising from, through and out of said operation without accounting or attempting to account for same or to obtain a determination of the liabilities, if any, owed by the said

bankrupt estate, for or on behalf of the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, nor has the said Barney, Trustee in bankruptcy, made or attempted to make any determination of the liabilities for any debts or obligations of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, to said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, nor to determine the liabilities, if any, owed by the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, to said syndicate, Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee.

XI.

Petitioners state that the trustee herein above referred to, Mike Lyvers, has heretofore executed conveyances to H. M. Barney, Trustee in bankruptcy. Petitioners verily believe that the conveyances executed by the said Mike Lyvers
87 were void and constituted a fraudulent conveyance of the beneficial interest of your petitioner and other similarly situated and should be cancelled and held for naught and for their reasons respectfully state that they are informed that the first of said conveyances by the said trustee was procured from said trustee, Mike Lyvers, by threats and by causing said trustee to believe that the court had ordered same executed and that the last of said conveyances were executed by the said trustee for the sole reaso that he netted Six Hundred Dollars ($600.00) out of t bankrupt estate of the Harry Morris Guaranteed Gusher Syndicate No. 3. Petitioners allege that if such facts are true that it is clearly in violation of the rights of the beneficial owners of the corpus of the Mike Lyvers Syndicate. Petitioners attach hereto and make a part hereof an affidavit executed by the said Mike Lyvers, Trustee and mark same Exhibit "B".

XII.

That your petitioners are informed and believe, and on such information allege that among the properties owned in fee, or in which said Mike Lyvers Syndicate, Mike Lyvers, Trustee, or Mike Lyvers, Trustee, own a substantial interest is the oil and gas lease known as the Balyou Farm, being the Northwest Quarter of the Northwest Quarter (NW¼ of NW¼) of Section Nine (9), Township Fifteen (15) South, Range Sixteen (16) West, Union County, Arkansas; that said lease above described is located in the very heart of what is known as the deep sand area of the Smackover Oil

Field and that said deep sand has been proven by large flowing wells in the immediate proximity of the above said described Balyou Farm, and that by reason of flowing wells that said lease has become highly valuable, in fact that it is worth many thousands of dollars.

XIII.

That your petitioners are informed and verily believe, and on such information allege that the said H. M. Barney, Trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, has without due process of law, attempted to charge the assets of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, with certain of the debts and obligations, or with all of the debts and obligations of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee. That he has, as such trustee, attempted to claim and to maintain absolute ownership of said properties of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers Trustee, by reason of said deed given by Mike Lyvers to W. H. Williford as security, instead of holding said properties as security for any determined indebtedness owed by Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, to the said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, or that might be owed by the Mike Lyvers Syndicate, Mike Lyvers Trustee, and or Mike Lyvers, Trustee, to any person or persons that might in turn be chargeable through such person or persons against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

88

XIV.

That your petitioners are informed and believe, and upon such information allege that purported deed of conveyance from Mike Lyvers to H. M. Barney was in direct dereliction of the rights and interests of your petitioners and of other so called cestui que trustants, or unitholders, and was made without consideration and value to said trust estate, Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee.

XV.

That your petitioners are informed and believe, and upon such information allege that no notice has been given by the Referee in Bankruptcy to the so-called cestui que trustants, or unit-holders of the Mike Lyvers Syndicate, Mike Lyvers,

Trustee, and or Mike Lyvers, Trustee, of any pending action, or actions, wherein their property or rights were in jeopardy by reason of the attempted seizure and retention of the property of said syndicates by the trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, although the trustee in
89 bankruptcy, H. M. Barney, and the Honorable Referee in bankruptcy have had in their possession since the 22nd day of December, 1924, the books and stubs of said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, giving the names and addresses of said unitholders.

XVI.

Your petitioners are informed and believe, and upon such information allege that the said trustee in bankruptcy, H. M. Barney, has attempted to sell all of the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and in said sale has attempted to include some or all of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, including valuable Balyou Farm, herein previously described and referred to, to the irreparable loss and injury of your petitioners and all other so-called cestui que trustants, or unitholders, of said Mike Lyvers Syndicate, Mike Lyvers Trustee and or Mike Lyvers, Trustee.

Wherefore, the premises considered, your petitioners will pray:

I.

That the alleged sale by the Trustee in bankruptcy, H. M. Barney, of the residue of the estate of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, to the Natural Gas & Petroleum Corporation, approved by the Honorable Referee on January 23rd, 1925, be set aside so far as it applies to any of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, or Mike Lyvers, Trustee.

II.

That an accounting be had between the said Trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, and that the amount of indebtedness, if any, owed by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and
90 or Mike Lyvers, Trustee, to the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris,

Trustee, and or to any other person, or persons, that might be chargeable against the assets and property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and upon such determination that the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, be chargeable only with such amount as is so determined.

III.

And that the said H. M. Barney be forthwith directed to restore the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, their property, and that the alleged deed of conveyance from Mike Lyvers, Trustee, to H. M. Barney, Trustee in bankruptcy, be canceled and declared void and of no effect other than as surety for any debt or debts justly due by said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, that would be chargeable against such assets in favor of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, either directly or through other person or persons, and for such other and further relief as petitioners may be entitled to.

Respectfully submitted,

(Sgd.) COULTER McHANEY,
By (Sgd.) E. H. Coulter,
Attorneys for Petitioners.

State of Illinois
County of Cook

Joseph P. Zimmer, after being duly sworn, states that he has read the above and foregoing petition and that the facts set out therein are true and correct as he verily believes.

(Signed) JOSEPH P. ZINNER,

Subscribed and sworn to before me this the 4th day of March, 1925.

(Seal) (Sgd.) MARY B. McGRATH,
Notary Public.

My commission expires: February 9, 1926.

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91 (Note by clerk of U. S. District Court: Here follows as Exhibit "A" to this exhibit "D" a copy of the Declaration of Trust, which is already incorporated in this

transcript as Exhibit "A" to the complaint. Said Declaration of Trust is, therefore, not recopied here.)

Certificate of Certification.

The El Dorado Abstract Company hereby certifies: That the foregoing pages numbered from one to fifteen inclusive constitutes a true and correct copy of a Declaration of Trust of "Mike Lyvers Syndicate" together with the certificate of record thereto, as the same appears of record in Record Book 157 at page 235 et seq., of the records of Union County, Arkansas.

In Witness Whereof, we sign hereto on this the 2nd day of March, A. D. 1925.

(Seal) EL DORADO ABSTRACT COMPANY,
By (Sgd) R. J. Simmons.

State of Arkansas
County of Union—ss.

Comes Mike Lyvers, and states on oath:

That I am the same Mike Lyvers who is trustee in certain declarations of trust, creating the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and the Mike Lyvers, Trustee, Syndicate, Mike Lyvers, Trustee. I further state that I executed to H. M. Barney, Trustee in Bankruptcy, of the Harry Morris Guaranteed Gusher Syndicate No. 3, three conveyances, covering the property owned by the above trust estates, of which I am trustee. I executed these conveyances for the reason that I was caused to believe that, unless I signed them, I would be in [convempt] of court and liable to be sent to prison. I wish to state further that the properties conveyed by me to said Barney were purchased with funds advanced by the Unit Holders of the above syndicate of which the Harry Morris Guaranteed Gusher Syndicate No. 3 had no interest in said properties at the time of the conveyances to the said Barney nor at any other time.

92 One of the conveyances executed by me to the said Barney was in consideration of the allowance and payment to me of a claim I held personally against the Morris Drilling Company. The claim was filed for $1,000.00, and I was allowed and paid $600.00.

(Sgd.) MIKE LYVERS,

Sworn and subscribed to before me, this the 11th day of March, A. D. 1925.

EDNA CHEATHAM,
Notary Public.

My commission expires: Jan. 29th, 1927.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division. In Re: Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, In Bankruptcy. H. M. Barney, Trustee in Bankruptcy, Nos. 674 and 677. Petition. Filed March 18, 1925, G. G. Pope, Referee in Bankruptcy.

(Sgd.) E. H. COULTER,
Attorneys at Law, El Dorado, Arkansas.

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93 Exhibit "E"

Response to Petition of L. J. Zug, F. O. Wilson and Joseph P. Zimmer by H. M. Barney, Trustee.

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, In Bankruptcy. Nos. 674 and 677.

Now comes H. M. Barney, trustee of the above named estates and for his response as such trustees to the petition of L. J. Zug, F. O. Wilson and Joseph P. Zimmer, filed herein by their attorney, R. M. Hutchins, alleges and says:

Said trustee denies that Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, are trust estates wherein one Mike Lyvers is called sole trustee, and denies that said alleged trust estates were constituted by a Declaration of Trust dated February 21, 1923, and recorded in the Circuit Clerk's office at El Dorado, Arkansas, in Book 157 at page 235, and denies that the alleged Declaration of Trust attached to said petition is a true copy thereof.

Said trustee denies that under the terms of said Declaration of Trust constituting said alleged trust estates there were created certain beneficial trust interests under the title of cestui que trustants, commonly known as unitholders, and denies that said beneficial interests were in the denomination of Ten Dollars ($10.00) each, and denies that the ownership thereof

was evidenced by certificates of units, the par or face value of which represented the number of Ten Dollar ($10.00) units or interests purchased in said estate, or the amounts respectfully contributed by such so-called cestui que trustants or unitholders to the corpus of said estates.

94 Said trustee further denies that said petitioners are duly constituted unitholders in said estate, and denies that said alleged units are evidenced by so-called certificates of interest therein as follows:

Name	Town	Date	Cert.	Amt.
L. J. Zug	Lebanan Co. Penn.	2		
F. O. Wilson	San Antonio, Tex.	2/10/23	#1121	$100.00
Joseph P. Zimmer	Cook Co. Ill.	1/29/23	#178	30.00
		2/6/23	#533	20.00

Said trustee denies that said petitioners appear for themselves and on behalf of all persons similarly situated.

Said trustee denies that the business of said trust estate was the buying and selling of oil and gas leases and the development of leases for oil and gas, and the production of oil and gas from oil and gas leases, and denies that the field of activity of said trust estates was in Union and Ouachita Counties in the State of Arkansas.

Said trustee denies that the business of said trust estates was carried on in the name of Mike Lyvers trustee, and denies that the title to the assets of said trust estates was in said Mike Lyvers, Trustee, for the benefit of the so-called cestui que trustants, as in the Declaration of Trust provided; and denies that the said Mike Lyvers for the business of said trust estates had an office or domicile in the Postoffice block, a building located in the city of El Dorado, Arkansas, and denies that said office aforesaid was the commonly known domicile or place of business of said estate, and that the location of same was of common knowledge in the community at all times prior to November 23, 1923.

Said trustee denies that said trust estates were integral and independent entities, and denies that the business of said trust estates in buying, selling, developing and operating oil and gas leases was an independent business and had no legal connection with any other similar trust estate or cor-
95 poration or partnership or individual so engaged in the same or allied business, and denies that for convenience and economy of operation there was a working agreement between the said Mike Lyvers and one Harry N. Morris,

but admits that said Harry N. Morris was trustee of a trust estate under the name and style of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, but denies that said working agreement was in no way a pooling of interests for common profit or liability nor an agreement of suretyship or responsibility.

Said trustee denies that each trustee and their respective trust estates were alone and solely responsible and liable for their own debts and liabilities, and denies that the only purpose of the intangible working arrangement was economy of operation and convenience.

Said trustee denies that under such arrangement the trust estate of Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, did not either by affirmation, act acquiescence or otherwise assume for said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, any liability of any kind or character whatsoever.

Said trustee also denies that Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, were alone and solely responsible for their own debts and liabilities, and only their own debts and liabilities were chargeable against their property or properties, and denies that their debts and liabilities in turn were not chargeable against any other properties whatsoever including the properties of Harry N. Morris and Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee.

Said trustee admits that on or about the 29th day of August, 1923, a receiver was appointed by the Honorable George M. LeCroy, Chancellor of the Second Division of the Chancery Court of Union County, Arkansas, of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, at the instance of Bender Iron & Supply Company and other creditors, but he denies that W. M. Williford was appointed as such receiver and duly qualified and took
96 charge of the assets of said Harry Morris Guaranteed Gusher Syndicate No. 3; he denies that at the time of said alleged appointment of said Williford as said receiver the operating leases of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, Trustee, were being operated by the Harry Morris Guaranteed Gusher Syndicate No. 3 for the purpose of economy in operation as alleged, and that in taking over possession of the properties of the Harry Morris Guaranteed Gusher Syndicate No. 3 said Williford as receiver came into possession of the leases owned by Mike Lyvers Syn-

dicate, Mike Lyvers, trustee, and Mike Lyvers, trustee; and denies that they were not named as defendants in said suit against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, and denies that the commercial debts and liabilities of said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, then owing other than the current monthly expenses for their proportion of the operating cost under their mutual working arrangements were not brought into said suit or presented in said suit.

Said trustee denies that said Williford as receiver continued to operate said operating leases of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, and received therefrom the profits and revenues, and denies that no accounting was had by said receiver between the Harry Morris Guaranteed Gusher Syndicate No. 3 and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, and denies that no demand was made by said Williford nor attempt made by said Williford, receiver, to secure an accounting, nor to determine the liabilities, if any, then owing by the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, to the estate of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, or any other person or persons.

Said trustee denies that during the course of the administration of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, by said Williford as receiver, and said Williford requested of Mike Lyvers, instead of an accounting and a statement with the said Mike Lyvers giving to him, the said receiver, security for the operating costs and any undetermined liability that there might be found to be owing by said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, that could be chargeable against the estates of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, then in the hands of said Williford as said receiver, and denies that thereupon the said Mike Lyvers delivered to said Williford, receiver, a deed to the property of said syndicate to be held by the said Williford, receiver, as such security until such time as a determination might be made of the liability, if any, owing to or that might be charged against the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, by or on behalf of Mike Lyvers Syndicate, Mike Lyvers, trustee, Mike Lyvers, trustee.

97

Said trustee denies that on or about the 23rd day of December, 1923, a petition in bankruptcy was filed by Willis B.

Cauble, Adelaide Higbee and Harry L. Beard against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, in the United States District Court for the Western District of Arkansas, Texarkana Division, but says that said petition was filed in said court by said petitioners and other petitioners on or about the 20th day of November, 1923.

Said trustee admits that H. M. Barney was appointed by said court temporary receiver of said bankrupt and admits that on or about the 30th day of December, 1923, upon answer filed and adjudication in bankruptcy was made of said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, and admits that said bankruptcy proceedings were referred to Honorable Gustavus G. Pope, referee in bankruptcy for the Texarkana Division of said District.

Said trustee admits that on or about the 30th day of January, 1924, at a meeting of creditors, duly called and held by said referee, said H. M. Barney was appointed trustee in bankruptcy for said bankrupt estate.

98 Said trustee admits that a petition in bankruptcy was filed in the United States District Court for the Western District of Arkansas, Texarkana Division, against Harry Morris individually, and admits that an adjudication was had in said matter, and that the said Harry N. Morris was duly adjudicated a bankrupt and said case referred to said referee for administration, and admits that said two bankrupt estates were duly consolidated by said referee in said cases before him.

Said trustee denies that no petition in bankruptcy has been filed and no adjudication in bankruptcy has been had against either Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee.

Said trustee denies that as receiver he took over from said Williford all and sundry the alleged several leases and other property held by said Williford as receiver, and the property of the said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, in the hands of the said Williford for convenience of operating under the working agreement set out in said petition including the deed given as security as alleged by the said Mike Lyvers, trustee, to hold harmless the said receiver Williford and the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, from loss and damage by the operation of the property of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike

Lyvers, trustee, in common with the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee.

Said trustee denies that he has operated the property of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, without an accounting thereof and without any attempt to make any accounting as between the said syndicates, Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, with the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt; and denies that the said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, ever in fact owned any property but alleges the facts to be that at all times said properties, if any, standing in the name of said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee,
99 were in truth and in fact the properties of the said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

Said trustee denies that he as such trustee has received the profits and revenue arising from, through and out of said alleged operation without accounting or attempting to account for same or to obtain a determination of the liabilities, if any, owed by the said bankrupt estate, for or on behalf of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee; and denies that the said Barney, trustee in bankruptcy, has not made or attempted to make any determination of the liabilities for any debts or obligations for the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, to said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, nor to determine the liabilities, if any, owed by the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee bankrupt, to said syndicate, Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee. He alleges the facts to be that the alleged indebtedness due against said alleged Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, was in truth and in fact the obligations of the said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt, and was and has been by the court rendered as such.

Said trustee admits that the said Mike Lyvers has executed conveyances to H. M. Barney, trustee in bankruptcy, but denies that said conveyances executed by the said Mike Lyvers were void and constituted a fraudulent conveyance of the beneficial interest of said petitioners and others alleged to be similarly situated; and denies that said conveyance should be

cancelled and held for naught; and denies that the first of said conveyances was procured by said trustee from said Mike Lyvers by threat and by causing said Mike Lyvers to believe that the court had ordered same executed; and denies that the last of said conveyances was executed by the said trustee for the sole reason that said Mike Lyvers netted six hundred dollars ($600.00) out of the bankrupt estate of the said Harry Morris Guaranteed Gusher Syndicate No. 3.

100 Said trustee alleges the facts to be that said Mike Lyvers made his said conveyances individually and as trustee under orders of this court, and that said orders have not been appealed from, modified, altered, reviewed or in any way revised or changed by said court, and that they are now final and cannot in this proceeding be collaterally attacked, and that said Mike Lyvers and those through whom he claims, and the petitioners herein are estopped to attack said conveyances based upon said court orders, which said estoppel is here specifically pleaded in bar of this petition.

Said trustee further alleges the facts to be that under oath Mike Lyvers has testified in this proceeding, of his own volition and at his own suggestion, that the Mike Lyvers Syndicate was in truth and in fact rated as the Harry Morris Guaranteed Gusher Syndicate No. 3 and was organized with the funds of the Harry Morris Guaranteed Gusher Syndicate No. 3, and that he, Mike Lyvers, had no beneficial interest herein and that he never exercised any rights as trustee thereunder but was merely an employee of the Harry Morris Guaranteed Gusher Syndicate No. 3 on a salary of Three Hundred and Fifty Dollars ($350.00) per month; that all of the disbursements made by the Mike Lyvers Syndicate in name were made by Dave Morris of the Harry Morris Guaranteed Gusher Syndicate No. 3 and Otto L. Morris and Harry Morris.

Said trustee further alleges the facts to be that Mike Lyvers heretofore filed herein his intervention alleging that he was the owner of said properties and leases as such trustee and individually, and that exceptions were filed to said intervention and evidence taken thereon and said intervention denied by said referee on review by said District Court, and said order of said court denying said intervention was and is now final and res adjudicata of said issues involved in said intervention, and said judgment and order cannot in this proceeding be collaterally attacked; that in filing said intervention said Mike Lyvers acted for himself and for himself as trustee and for the benefit of his alleged

unitholders, and these petitioners are therefore estopped to deny the title of this trustee to said properties.

101 Said trustee denies that said deed of said Mike Lyvers to this trustee is in violation of the rights of the beneficial owners of a corpus of the Mike Lyvers Syndicate, and denies that the alleged affidavit attached to said petition is in truth the affidavit of Mike Lyvers, trustee.

Said trustee denies that among the properties owned in fee or in which the said Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, owns a substantial interest, is the oil and gas lease known as the Balyou Farm, being the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section Nine (9) Township Fifteen (15) South, Range Sixteen (16) West, Union County, Arkansas; and denies that said lease is located in the very heart of what is known as the deep sand area of the Smackover Field, and denies that said alleged deep sand has been proven by large flowing wells in the close proximity of the above described Balyou Farm; and denies that by reason of flowing wells said lease has become highly valuable and worth many thousands of dollars.

Said trustee denies that this trustee has without due process of law attempted to charge the assets of the Mike Lyvers Syndicate, Mike Lyvers, trustee, Mike Lyvers, Trustee, with certain of the debts and obligations or with all of the debts and obligations of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, but admits that as such trustee he is the absolute owner as trustee of the bankrupt estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, of the alleged properties of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and or Mike Lyvers, trustee, but denies that he is such by reason of the deed given by Mike Lyvers to W. H. Williford as security but says that he is such owner by reason of the fact that said assets are and have always been the property of said bankrupt estate. He denies that he is claiming ownership by reason of said deed instead of holding said properties as security for any determined indebtedness owed by Mike Lyvers Syndicate, Mike Lyvers, trustee, and or

102 Mike Lyvers, trustee, to the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt, or that might be owed by the Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, to any person or persons that might in turn be chargeable through such person or persons against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee.

Said trustee denies that the deed of conveyance from Mike Lyvers to H. M. Barney as trustee was in direct dereliction of the rights and interests of the petitioners or of the so-called cestui que trustants, or unitholders; and denies that same was made without consideration and value to said trust estates, Mike Lyvers, Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, but alleges the facts to be that said deed was made for the reasons hereinabove stated.

Said trustee denies that no notice has been given by the referee in bankruptcy to the so-called cestui que trustants or unitholders of the Mike Lyvers Syndicate, Mike Lyvers, trustee, and or Mike Lyvers, trustee, of any pending action or actions where in their property or rights were in jeopardy by reason of the attempted seizure and retention of the property of said syndicate by the trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt, and denies that the said trustee and the said referee in bankruptcy have had in their possession since the 22nd day of December, 1924, the books and stubs of Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, giving the names and addresses of said unitholders.

Said trustee denies that he has attempted to sell all the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt, and in said sale attempted to include some or all of the property of Mike Lyvers Syndicate, Mike Lyvers, trustee, and Mike Lyvers, trustee, including the said valuable Balyou Farm to the irreparable loss and injury to the petitioners and all other so-called cestuis que trustants or unitholders of the Mike
103 Lyvers Syndicate, Mike Lyvers, trustee, and or Mike Lyvers, trustee.

Said trustee further alleges the facts to be that all the issues raised in said petition have heretofore been raised in this court and adjudicated and that said petitioners have at all times as creditors of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, trustee, bankrupt, received notice to which they in law are entitled as residuary creditors of said bankrupt estate, and said trustee alleges that all of said issues are now res adjudicata and final as filed against said petitioners and that all of the judgments, orders and decrees of said court upon said issues cannot in this proceeding be collaterally attacked and said petitioners are

estopped to maintain this petition, and that this petition should be dismissed for want of equity.

Wherefore, premises considered, said trustee prays that said petition be dismissed, disallowed and held for naught, and that he as such trustee have judgment for his costs herein, and for all other proper relief to which said trustee may be entitled.

(Sgd.) H. M. BARNEY,
Trustee in bankruptcy of the estate of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, bankrupt.

A. D. Keeney and
Will Steel,
Attorneys for Trustee.

United States of America,
Western District of Arkansas.

H. M. Barney, after being duly sworn, states on oath that he has read the above and foregoing response and is acquainted with the allegations of fact therein made and that said allegations are true to the best of his information, knowledge and belief.

(Sgd.) H. M. BARNEY.

Subscribed and sworn to before me this the 18th day of March, 1925.

(Sgd.) GUY H. LAMBETH,
(Seal) Notary Public, Miller Co., Ark.

My commission expires July 10, 1927.

104 Nos. 674 and 677. In the District Court of the United States, for the Western District of Arkansas, Texarkana Division. In the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, in Bankruptcy. Response to Petition of L. J. Zug, F. O. Wilson and Joseph P. Zimmer by H. M. Barney, trustee. Filed March 18, 1925, G. G. Pope, Referee in Bankruptcy.

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105 Exhibit "F".

Order Denying Petition of L. J. Zug, F. O. Wilson and Joseph P. Zimmer.

In the matter of Harry Morris G. G. S. #3, Bankrupt, No. 674, 677.

At Texarkana, in the said District, on this March 18, 1925, before Gustavus G. Pope, one of the referees in bankruptcy

of said court, the following proceedings were had in said cause:

L. J. Zug, F. O. Wilson and Joseph P. Zimmer, through their attorney, R. M. Hutchins, of El Dorado, Ark. filed their objections to the sale and petition for accounting of the Mike Lyvers estate, and same is heard upon the petition, the objections and response of the trustee, the testimony and papers in connection with the intervention of Mike Lyvers filed herein claiming the property set out in the petition, the testimony and claim of Mike Lyvers, and the quit claim deeds from Mike Lyvers, and various records and papers in this estate.

After due consideration the referee finds that Mike Lyvers intervened for the property described, and after hearing same, it was found that the property belong to the bankrupt, and a part of the Morris estate, and that said order was reviewed by the District Judge and affirmed and the Mike Lyvers ordered to execute deed and other conveyances to the trustee in bankruptcy, which was done. It further appears that Mike Lyvers was merely working for a salary of $250.00 per month, and the balance of his wages amounting to $1000 were allowed after a hearing upon same and the objections thereto. It appears that Harry Morris, Otto Morris and D. A. Morris had several series of units and purported to be separate estate when in fact they were all the same and handled as one institution. The petitioners do not set out any ground for a setting aside of the sale of the assets of the Natural Gas & Petroleum Co.

It is therefore ordered that said petition be and the same is hereby denied both as to the sale and as to a separate account of the purported funds of the Mike Lyvers estate.

G. G. POPE,
Referee in Bankruptcy.

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106 Motion to Strike out Portions of Proposed Answer.

Filed in U. S. District Court, January 29, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al.,
Plaintiffs;
No. 47 vs. Equity.
Natural Gas & Fuel Corporation, Defendants.

Please take notice that upon the complaint herein and the proposed answer of the Arkansas Natural Gas Corporation,

the undersigned will move this court on the 3rd day of February, 1930, at 10 A. M., o'clock, at El Dorado, Arkansas, or as soon thereafter as counsel can be heard, for an order directing the striking out of the following portions of said proposed answer:

The clause in paragraph one, page one of the proposed answer reading, "In lieu of the Natural Gas & Fuel Corporations," inasmuch as the only possible right which the Arkansas Natural Gas Corporation can claim is the right to intervene to protect its interest and to be made co-defendant with the Natural Gas & Fuel Corporation, which has already petitioned the removal of the case from the state court; filed a motion to dismiss in the United States court, tried same and after judgment of lower court sustaining its motion, appeared in the Circuit Court of Appeals of the 8th Circuit, where the lower court was reversed and no rehearing was asked, and further that the clause violates Equity Rule 37.

The allegation in paragraph third, page two of proposed answer, reading, "alleges that said intervention was in truth and in fact filed by the said Mike Lyvers as Trustee for the Mike Lyvers Syndicate and on behalf of said syndicate, and that at the hearing upon said intervention said property was claimed by Mike Lyvers for and on behalf of said syndicate and in his capacity as trustee therefor" as introducing new issues not responsive to the original petition, and an attempt to vary written evidence by parol.

107 That portion of paragraph sixth, pages 3 and 4, of the proposed answer reading, "Defendant denies that at the time of the execution of said conveyance to it, the said Natural Gas & Petroleum Corporation was advised or had any reason to believe that said leases covering the Northwest Quarter of the Northwest Quarter of Section 9, Township 16 South, Range 15 West, were the property of Mike Lyvers Syndicate, but on the other hand, defendant states that said Natural Gas & Petroleum Corporation at the time of said purchase was an innocent purchaser and paid a full consideration for said property, and was without notice or knowledge of any defects whatsoever in the title of the rustee in Bankruptcy."—for the reason that the allegations are mere conclusions of law and are not specific, and violate Equity Rule 30.

The allegation in paragraph ninth, page 4 of the proposed answer, stating, "but denies that it has converted to its own use any oil or the proceeds thereof belonging to the plaintiffs herein, and denies that it has produced or sold oil from said

leases to the amount of Five Hundred Thousand Dollars ($500,000.00).''—in that it is evasive and not specific, and violates Equity Rule 30.

Paragraph tenth, pages 4 and 5 of proposed answer, in that it violates Equity Rule 37, and, in the alternative, that if original defendant might originally plead such, the right has been waived by petition for removal, filing of motion to dismiss and proceedings had in the United States District Court and Circuit Court of Appeals, for the 8th Circuit.

Paragraph eleventh, page 5 of the proposed answer, inasmuch as it is an attempt to introduce new and foreign issues, is unwarranted in law; fails to set forth a cause of action as a counter claim, is in violation of the principle of law frequently announced by the Supreme Court of the United States and particularly emphasized in Cunningham vs. Brown, 265 U. S. 1, and fails to allege matters cognizable by a court of equity.

Paragraphs twelfth and thirteenth, pages 5 and 6 of
108 the proposed answer, in that they introduce new issues, refer to property not involved in this suit, and are confusing and violate Equity Rules 30 and 37.

That part of paragraph fourteenth, page 7 of proposed answer, reading, ''In this connection, defendant states and avers that while it is true that the said petition of Mike Lyvers and the said orders of the Referee and of the District Court on their face did not formally mention or refer to him as trustee of the Mike Lyvers Syndicate, yet in truth and in fact said petition was filed by the said Mike Lyvers as Trustee for the Mike Lyvers Syndicate, all of the proof at the hearing was upon the issue as to whether or not said leases were the property of Mike Lyvers as Trustee for the Mike Lyvers Syndicate, and not of Mike Lyvers personally, and at no time did Mike Lyvers at said hearing claim said properties other than as trustee for the Mike Lyvers Syndicate. That while the said pleadings and orders did not refer to Mike Lyvers as trustee, yet in truth and in fact he acted as trustee in the filing of said petition, and at said hearing claimed the property as trustee for the Mike Lyvers Syndicate, and the true intent and purpose of the order of the Referee and of the District Court affirming same was to adjudicate the title to said property to be in the bankrupt estate of Mike Lyvers as Trustee for Mike Lyvers Syndicate, and to require the said Mike Lyvers to convey as trustee for Mike Lyvers Syndicate to the Trustee in Bankruptcy.''—in that same is contradictory of judicial allegations, evasive

and not specific, and attempts to introduce new issues and to contradict written evidence by parol, and violates Equity Rules 30 and 37.

Paragraph fifteenth, page 7 of proposed answer, in that it attempts to raise an issue disposed of in this case by the Circuit Court of Appeals, for the 8th Circuit, and attached exhibits do not show the basic facts necessary to a plea of res adjudicata, and tha it attempts to contradict written instruments, and especially the exhibits attached to the
109 proposed answer, and introduces new issues not responsive to complaint, and does not show any proceedings taken in a court of competent jurisdiction, contradictorily with proper parties, and violates Equity Rules 30 and 37.

Paragraphs sixteenth and seventeenth, pages 7 and 8 of proposed answer, for the reason that they set forth res inter alios acta, and exhibits attached show that proceedings were not had before a court of competent jurisdiction, nor contradictorily with the Mike Lyvers Syndicate, nor Mike Lyvers, Trustee of Mike Lyvers Syndicate, nor the alleged purchaser, Natural Gas & Petroleum Corporation, nor does it show that the allegation that the case was not collusive was made, nor any proper allegations required for those who would represent a class, or bring a stockholders suit; that it violates Equity Rules 27, 30, 37 and 38.

Wherefore, John H. Page, trustee of Mike Lyvers Syndicate, and Mike Lyvers Syndicate, pray that the above paragraphs and portions thereof named in this motion, be stricken from the proposed answer, for the reason that they fail to set forth facts sufficient in law to constitute a defense to the cause of action set forth in the bill of complaint.

FRANK J. LOONEY,
J. M. GRIMMET,
McNALLEY & SELLERS,
Solicitors for Plaintiff.

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110 Answer to Amendment to Complaint.

Filed in U. S. District Court, April 22, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al.,
Plaintiffs,
vs.
Natural Gas & Fuel Corporation, Defendant.

Comes the Arkansas Natural Gas Corporation and pursuant to leave of the court files this its answer to the amendment heretofore filed by plaintiff to his complaint:

Defendant denies that in December, 1925, John H. Page, as Trustee for Mike Lyvers Syndicate, filed a suit similar to this one in the United States District Court for the Eastern District of Arkansas, but states that said suit was not filed until January 8, 1926.

Defendant states that a motion was filed by the defendant in said suit to quash service upon it and that said motion was filed and was later sustained by the Judge of said court upon the ground that the defendant was a foreign corporation organized under the laws of Delaware, that its place of business in Arkansas was in the Western District thereof, and that it was not present or subject to service in the Eastern District of Arkansas.

Defendant denies that the hearing upon said motion to quash, or the entry of the order upon the same was delayed by any act of said defendant or its attorney, and states that no request was ever made by said defendant or its attorney for any delay in the argument upon said pleading.

Defendant denies that the Hon. H. Smead Powell was ever in charge of the conduct of the said suit in the Eastern District of Arkansas, and denies that after his death the hearing on said motion to quash was delayed by the necessity of the employment of other counsel by the plaintiff therein. To the contrary, defendant states that the said John H. Page, as trustee, was at all times represented in said suit by
111 other attorneys of record and that the said motion to quash could have been taken up and argued and disposed of at any time upon motion of the plaintiff's remaining attorneys.

Defendant denies that after the dismissal by the District Judge of the Eastern District of Arkansas of the suit brought in that court it became or was necessary for the said John H. Page, as trustee, before instituting another suit to secure copies of exhibits from the Clerk of the Western District of Arkansas to attach to the complaint therein: denies that said John H. Page or his attorneys were informed that said exhibits were misplaced, and denies that it was or became necessary, before instituting said suit, to secure an order from the Judge of the Eastern District of Arkansas for the release of the exhibits filed with the complaint in his court; and denies that the delay in the bringing of the present suit was occasioned by absence or illness of the Judge of the Eastern District.

Defendant further denies that the defendant or its predecessor in title took possession of the property or began developments before the approval of the bankruptcy sale.

Premises considered, defendant prays, as in the answer heretofore filed by it, that the bill of complaint herein be dismissed for want of equity, and for all such relief as asked in said answer.

JEFF DAVIS, MOORE, GARY & BURROW,
Attorneys for Defendant, Arkansas Natural Gas Corporation.

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112 Order Substituting Arkansas Natural Gas Corporation as Party Defendant and Striking Out Certain Allegations to Answer, etc.

Entered in U. S. District Court May 26, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al., Plaintiff,
No. 47 vs. Equity.
Natural Gas & Fuel Corporation, Defendant.

On this day the above entitled cause comes on to be heard upon the motion of Arkansas Natural Gas Corporation to be substituted as defendant herein in lieu of Natural Gas & Fuel Corporation, and for leave to file its answer as attached to said motion, and upon the motion filed by plaintiff to strike out certain portions of said proposed answer of Arkansas Natural Gas Corporation.

Plaintiff and said Arkansas Natural Gas Corporation appearing by their respective attorneys, and said motions having been submitted upon argument of counsel, and the court being well and sufficiently advised, it is hereby accordingly ordered:

1. That the motion of Arkansas Natural Gas Corporation to be made party defendant in this action in lieu of Natural Gas & Fuel Corporation be and the same is hereby granted; that the said Arkansas Natural Gas Corporation be substituted as party defendant in this action in lieu of Natural Gas & Fuel Corporation; that the cause henceforth proceed in the name of Arkansas Natural Gas Corporation as defendant, and that the said Corporation have leave to file its said answer as defendant.

2. That the following allegations appearing in the third paragraph of the answer of Arkansas Natural Gas Corpora-

tion, and on the second page thereof, be and they are hereby stricken from said answer, to-wit:

113 . "* * * but defendant denies that said intervention was filed merely in a personal capacity, but to the contrary alleges that said intervention was in truth and in fact filed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate and on behalf of said syndicate, and that at the hearing upon said intervention said property was claimed by Mike Lyvers for and on behalf of said syndicate and in his capacity as Trustee therefor."

3. That the following allegations appearing in the sixth paragraph of the answer of Arkansas Natural Gas Corporation, and on the third and fourth pages thereof, be and they are hereby stricken out of said answer, to-wit:

"Defendant denies that at the time of the execution of said conveyance to it, the said Natural Gas & Petroleum Corporation was advised or had any reason to believe that said leases covering the Northwest Quarter of the Northwest Quarter of Section 9, Township 16 South, Range 15 West, were the property of Mike Lyvers Syndicate, but on the other hand, defendant states that said Natural Gas & Petroleum Corporation at the time of said purchase was an innocent purchaser and paid a full consideration for said property, and was without notice or knowledge of any defects whatsoever in the title of the trustee in bankruptcy.

4. That the whole of the tenth paragraph of the answer of Arkansas Natural Gas Corporation, appearing on pages 4 and 5 thereof, be and the same is hereby stricken from said answer.

5. That the whole of the twelfth and thirteenth paragraphs of the answer of Arkansas Natural Gas Corporation, appearing on pages 5 and 6 thereof, be and the same are hereby stricken from said answer.

6. That the following allegations of the fourteenth paragraph of said answer, appearing on page 7 thereof, be stricken from said answer, to-wit:

"In this connection, defendant states and avers that while it is true that the said petition of Mike Lyvers and the said orders of the referee and of the District Court on their face did not formally mention or refer to him as trustee of the Mike Lyvers Syndicate, yet in truth and in fact said petition was filed by the said Mike Lyvers as Trustee for the Mike Lyvers Syndicate, all of the proof at the hearing was upon

the issue as to whether or not said leases were the property of Mike Lyvers as Trustee for the Mike Lyvers Syndicate, and not of Mike Lyvers personally, and at no time did Mike Lyvers at said hearing claim said properties other than as Trustee for the Mike Lyvers Syndicate. That while the said pleadings and orders did not refer to Mike Lyvers as Trustee, yet in truth and in fact he acted as Trustee in the filing of said petition, and at said hearing claimed the property as trustee for the Mike Lyvers Syndicate, and the
114 true intent and purpose of the order of the Referee and of the District Court affirming same was to adjudicate the title to said property to be in the bankrupt estate of Mike Lyvers as Trustee for Mike Lyvers Syndicate, and to require the said Mike Lyvers to convey as Trustee for Mike Lyvers Syndicate to the Trustee in Bankruptcy."

7. That the whole of the fifteenth paragraph of the answer of Arkansas Natural Gas Corporation, appearing on page 7 thereof, be and the same is hereby stricken from said answer.

8. That the motion of the plaintiff to strike be and the same is hereby in all other respects denied.

9. To each of the rulings hereinabove set out in paragraphs numbered 1 and 8, respectively, of this order the plaintiff separately and severally excepts and asks that his exceptions be noted of record, which is hereby accordingly done. To each of the rulings respectively set out in paragraphs numbered 2, 3, 4, 5, 6 and 7 of this order the defendant Arkansas Natural Gas Corporation separately and severally excepts and asks that its exceptions be noted of record, which is hereby accordingly done.

A. LEE WYMAN,
District Judge.

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115 (Amendment to Answer of Arkansas Natural Gas Corporation.)

Filed in U. S. District Court September 26, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al., Plaintiff,

No. 47 vs. In Equity.

Arkansas Natural Gas Corporation, Defendant.

Comes the Arkansas Natural Gas Corporation and by leave of court files this its amendment to its original answer heretofore filed in this cause.

The defendant denies that the quit claim deed executed by Mike Lyvers to H. M. Barney, trustee for Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, bankrupt, recorded in Record Book 197 of the records of Union County, Arkansas, at page 247, which is Exhibit "G" to the complaint of the plaintiff herein filed, was executed without consideration moving to the said Mike Lyvers, trustee for Mike Lyvers Syndicate.

MOORE, GRAY AND BURROW,
JEFF DAVIS,
Attorneys for Defendant.

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116 (Trial, September 26, 1930.)

John H. Page, Trustee, Plaintiff,
No. 47 vs. Equity.
Arkansas Natural Gas Corporation, Defendant.

This cause having been set for final hearing on this date, September 26, 1930, come the parties by their solicitors, and defendant by leave of court files an amendment to its answer herein, to which allowance and filing the plaintiff excepts.

Thereupon the cause comes on for final hearing, the case is stated by counsel, evidence is adduced, and at the hour of adjournment further hearing is postponed until tomorrow morning, 9 o'clock.

FRANK A. YOUMANS, Judge.

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117 (Trial, September 27, 1930.)

This September 27, 1930, comes the parties hereto by their solicitors, and the hearing herein proceeds, and further evidence is adduced, and at the hour of adjournment the further hearing is postponed until Monday morning, 9 o'clock, September 29, 1930.

FRANK A. YOUMANS, Judge.

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118 (Trial, September 29, 1930.)

This September 29, 1930, come the parties hereto by their solicitors, and the hearing of this cause proceeds. Plaintiff files a motion to strike portions of the testimony. This motion is to be hereafter argued and ruled upon. The remainder of the evidence is adduced. At the conclusion of

the evidence by agreement of counsel the cause is passed for argument until November 6, 1930, at Fort Smith.

FRANK A. YOUMANS, Judge.

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119 (Opinion of District Court.)

Filed in U. S. District Court Nov. 29, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al., Plaintiff,

No. 47 vs. In Equity

Natural Gas & Fuel Corporation, Defendant.

Heretofore a motion of the defendant to dismiss the complaint of plaintiffs was sustained. Plaintiffs stood upon the complaint and a decree of dismissal was entered. An appeal was taken and the decree of this court was reversed. The mandate of the Court of Appeals contains the following order:

"It is further ordered that this cause be and the same is hereby remanded to the said District Court with directions to allow the plaintiffs to amend their bill if so advised, within a reasonable time, and for further proceedings consistent with the opinion of this court."

The motion to dismiss was directed to the complaint with the exhibits attached thereto. The complaint was the only pleading involved. On behalf of the plaintiffs it is contended that certain matters were conclusively settled by the Court of Appeals in its opinion which appears in 35 Fed. 2d. page 462, and that questions passed upon by the Court of Appeals have become the law of this case and are binding upon the trial court. It is therefore necessary to examine the opinion of the Court of Appeals and to determine what, if any, points have become the law of the case.

One question raised upon the motion to dismiss and considered by the Court of Appeals was as to the jurisdiction of the Referee in Bankruptcy to make a summary order upon Mike Lyvers to execute a deed to the property involved in this case to H. M. Barney, Trustee in Bankruptcy, for the Harry Morris Guaranteed Gusher Syndicate No. 3 and Harry Morris individually. On that point the Court of Appeals said:

"We do not inquire collaterally into the merits of this proceeding, passing the serious contention that the Referee had not jurisdiction to make the summary order on Lyvers."

120 The question of the jurisdiction of the Referee to make the summary order was thus expressly left open. That jurisdiction depended upon the actual or constructive possession of the property in controversy by the trustee in bankruptcy, or upon the consent of the claimant to the property that the right to the possession be tried in the bankruptcy court.

In the case of Priest vs. Weaver, 43 F. 2d. 57, decided by the Court of Appeals for the Eighth Circuit on August 18, 1930, Judge Gardner, speaking for that court, said:

"The bankruptcy court had jurisdiction to determine whether it had possession of the property actually or constructively. If it had possession it could determine in a summary proceeding controversies involving substantial adverse claims thereto; but if it lacked possession, it could not, in a summary proceeding, adjudicate the validity of a substantial adverse claim. Taubel, etc. Co. vs. Fox, 264 U. S. 426, 44 S. Ct. 396, 401, 68 L. Ed. 770; Harrison vs. Chamberlin, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897; Remington on Bankruptcy, Section 2395."

In this case the evidence clearly shows that Barney as trustee in bankruptcy had possession of the property in controversy.

The first paragraph of Lyvers' intervention reads as follows:

"Now comes Mike Lyvers of Shreveport, Caddo Parish, Louisiana, one of the creditors of the above bankrupt estate and would respectfully represent that he is informed and believes that Honorable H. M. Barney, Trustee of the above bankrupt estate, has taken possession of and is claiming certain individual property of said Mike Lyvers as being property of the bankrupt estate."

The paragraph of the same intervention preceding the prayer, reads as follows:

"Your petitioner would further request that the trustee be required to turn over to him all producing property held by the said trustee belonging to the said Mike Lyvers as well as all personal property used in connection therewith."

The possession of the trustee in bankruptcy was admitted by Lyvers and the jurisdiction of the court was invoked to put him in possession of that property.

It appears from the testimony of H. L. Williford that prior to the filing of the involuntary petition in bankruptcy against Harry Morris Guaranteed Gusher Syndicate
121 No. 3 all of the property of that syndicate had come into the possession of H. L. Williford as receiver in a case pending against that syndicate in the Chancery Court of Union County, and that he had taken possession of the particular piece of land involved in this case under that receivership. The petition in bankruptcy against the same syndicate was filed in the District Court of the United States for the Western District of Arkansas, Texarkana Division on November 20, 1923, on which date H. M. Barney was appointed receiver of the alleged bankrupt estate by Judge Faris who was holding court at Texarkana at that time. It appears from the testimony of H. M. Barney that he took possession of the tract of land involved in this case together with two other tracts called respectively the Mullins and Johnette leases. The lease involved in this case is called the Bilyou lease. All three of these leases were the property of the Mike Lyvers Syndicate. At the time Barney took possession as receiver in bankruptcy oil was being produced from the Mullins and Johnette leases. No wells had been sunk on the Bilyou lease. It was vacant property. Barney put placards upon the lease stating in substance that it was in his hands as receiver in bankruptcy. During the time that he held it the annual rental reserved in the lease became due and Barney paid it. Williford testifies that Lyvers gave a deed to him as receiver to the Mullins lease. The deed was introduced in evidence. Williford testifies also that Lyvers promised to convey to him the Bilyou lease, but never did so. Williford surrendered possession of all the property to Barney. Barney was afterwards elected trustee in bankruptcy. Therefore, the court had jurisdiction upon both grounds, that is, the court had possession of the property through the trustee in bankruptcy, and Mike Lyvers as claimant therefor, consented that the court should determine the right to the possession. Bryan vs. Berngeimer, 181 U. S. 188, 197. Upon review the court held that the only point necessary to be reviewed was that with reference to jurisdiction. The court held that the referee had jurisdiction and affirmed his order.

122 Another question is the effect of the deed made by Mike Lyvers to Barney conveying the property involved in this case. With reference to that, the Court of Appeals said:

"It is clear that the order on him as an individual had no force whatever upon him as trustee of the Mike Lyvers Syndicate. It was not an adjudication against him as trustee and it does not estop the plaintiffs as successor trustee to maintain this bill."

Plaintiffs contend that the above quoted statement has become the law of the case and precludes the admission of any testimony with reference to the effect of the order of the referee.

In the case of Meyer vs. First National Bank, 248 Fed. 679, the Court of Appeals for the Eighth Circuit had before it a case in which at the conclusion of the plaintiffs' case the District Court entered a judgment in favor of the defendant dismissing the complaint. In deciding the case on appeal the Court of Appeals said:

"Upon the merits we think the evidence shows without substantial conflict that plaintiff loaned the defendant ten thousand dollars for thirty days upon the security of the Holm note with its collateral. Defendant applied that money to its own use and has never repaid it. It is not important whether the Holm note was in fact the property of the defendant. The question is: How did its cashier present the matter to plaintiff at the time the loan was made? The evidence clearly shows that he represented the paper as a part of the assets of defendant's bank, and that he offered it as collateral for a loan to his bank. Defendant cannot escape the repayment of money which it received and used, upon a showing that the note which it offered as collateral to the loan in fact did not belong to it. Whether that was so or not, the loan was certainly made to it. It received the money and used it upon a promise to its cashier to repay it within thirty days. That it has failed to do and upon the evidence before the court the plaintiff was entitled to recover."

The judgment of the lower court was reversed with directions to grant a new trial.

The case was re-tried and again appealed. Upon that appeal in the case of Meyer vs. First National Bank, 291 Fed. 42, 43, the Court of Appeals said:

123 "It is claimed by plaintiff in error that as the former opinion of this court held the ten thousand dollars in controversy to be a loan from plaintiff in error to defendant in error, and that the evidence in the second trial was substantially the same as in the first, therefore it is the settled law

of the case that defendant in error borrowed the ten thousand dollars from the plaintiff in error and has never repaid it. It is well established doctrine in the Federal Court that upon a second writ or error, or appeal, questions of law or fact determined upon the first trial cannot be considered, provided the evidence was substantially the same on both trials. Such decision unless the evidence differs in material respects in the second hearing becomes the law of the particular case."

Further in the opinion the court said:

"In the former trial no evidence was introduced on the part of the defendant."

After stating that in the second trial the defendant did introduce evidence, the court said:

"It is apparent from the decision of the trial court that it took into consideration as important matters testimony that was not in the first trial."

Further in its opinion the court said:

"The decision, therefore, in the former trial was not conclusive upon the trial court, or upon this court, and did not become the law of the present case."

In the appeal in the case at bar no evidence of either side appeared except insofar as the exhibits to the complaint of plaintiffs could be denominated evidence. At the trial those exhibits were introduced by the plaintiff as evidence, and if no evidence had been introduced by the defendant the decision of the Court of Appeals could well be held as the law of the case. But it did introduce material evidence upon the questions passed upon by the Court of Appeals with reference to which, defenses were pleaded in its answer.

It appears from the testimony that the only title that Lyvers had was that acquired through two conveyances to him by Otto L. Morris. One, entitled "Assignment of oil and gas lease", was executed by Otto L. Morris on the 26th day of April, 1923. It purported to convey "to Mike Lyvers Syndicate and his heirs, successors and assigns" West one-half of Northwest quarter of Northwest quarter of Section 9, Twp. 16 South, Range 15 West, in Union County, Arkansas. The other conveyance was executed by Otto L. Morris on the 2nd day of July, 1923. It was entitled "Assignment of
124 oil and gas lease." It conveyed to "Mike Lyvers Syndicate, Mike Lyvers, Tr. and his heirs, successors and assigns, the east half of the Northwest quarter of the North-

west quarter of Section 9, Twp. 16 South, Range 15 West, Union County, Arkansas. The two assignments thus made by Otto L. Morris were the same property described in Exhibit A to the Mike Lyvers intervention before the Referee in Bankruptcy and called in said exhibit "The J. A. Bilyou farm". It thus appears that the only title that Mike Lyvers held was that as trustee for the Mike Lyvers Syndicate. The testimony of Riggs shows how the Lyvers leases were operated in conjunction with the properties belonging to the Harry Morris Guaranteed Gusher Syndicate No. 3. The testimony of the cashier of the bank at El Dorado shows that there was carried on the books of his bank an account of Mike Lyvers Syndicate, Mike Lyvers Trustee, and that the Morrises, of whom there were three brothers, were given powers of attorney by Lyvers to draw checks on that account.

The Referee had jurisdiction of Mike Lyvers by reason of his intervention for the restoration of the Bilyou lease to him. Barney as trustee in bankruptcy, had the possession of the lease.

The order of the Referee, omitting caption and signature, is as follows:

"On this March 6, 1924, the interventions of Otto L. Morris and Harold L. Lyvers (Mike) Lyvers claiming certain oil leases and other properties set out in the interventions and petitions of trustee to require interveners to execute deeds comes on for hearing upon the interventions, the objections of the trustee, petitions to require interveners to execute deeds and conveyances, the motion to dismiss filed by interveners, the testimony of F. L. Copeland, Jesse Riggs, Harry G. Miller, J. P. Moran and B. Bender, and also certified copies of the various assignments of oil leases, and all exhibits to the testimony of the various witnesses; also the testimony of H. L. Williford, and from the evidence the Referee finds that:

All of the property claimed by the interveners was purchased with the funds of the bankrupt, derived from the sale of units in the trust estate of Harry Morris Guaranteed Gusher Syndicate No. 3, the bankrupt herein, and that the title to the various properties, including the property intervened for and more particularly set out in the various assignments introduced in evidence, was taken in the name of
125 Mike Lyvers and Otto L. Morris, and also in the name of Mike Lyvers, Trustee in Bankruptcy herein. All of said property was merely held by said parties for the benefit

of the bankrupt and they had no interest in same otherwise. They not only handled these properties in this manner but handled other properties in like manner and in the name of various syndicates for their own convenience. All of the properties belonged to a common fund, although badly commingled and hard to trace owing to the absence of the books of the various syndicates, including those of the bankrupt; and also because the interveners have failed and refused to appear before the referee and testify.

The interveners appeared by attorney at the various hearings held on these interventions, and the witnesses on behalf of the trustee were cross-examined by various attorneys representing the interveners, and also the bankrupt.

It is therefore ordered that the interventions of Otto L. Morris and Harold L. (Mike) Lyvers be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate, and each is hereby ordered to execute conveyances transferring the legal title to all said properties to the trustee in bankruptcy, H. M. Barney."

On review this order was affirmed.

Complying with the order of the Referee Mike Lyvers on the 13th of October, 1924, made to Barney as Trustee, a quit claim deed which, together with caption and signatures, reads as follows;

"Quit-Claim Deed."

Mike Lyvers
Mike Lyvers Syndicate
and Mike Lyvers, Trustee.
To
H. M. Barney, Trustee in
Bankruptcy of the Estate of
Harry Morris Guaranteed Gusher
Syndicate No. 3, Harry N. Morris,
Trustee, and Harry N. Morris, Bankrupt.

Know All Men By These Presents:—That I, Mike Lyvers, individually, and as Trustee for the Mike Lyvers Syndicate, and also acting herein as Mike Lyvers, Trustee, for and in consideration of One Dollar to me cash in hand paid by H. M. Barney, Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, bankrupt, do hereby grant, sell and quit-claim unto the said H. M. Barney, Trustee in Bankruptcy of the Estate of Harry Morris Guaranteed Gusher Syndicate

No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, and unto his successors and assigns forever, the following lands lying and being situated in the Counties of Union and Ouachita, State of Arkansas, to-wit:

1. All my right, title and interest in and to that certain oil and gas lease known as the 'McAdoo lease', being the North half (N½) of the Southeast quarter (SE¼) of the Southwest Quarter (SW¼) of Section Ten (10), Township Sixteen (16) South, Range Sixteen (16) West, situated in the County of Union and State of Arkansas.

126 2. That certain oil and gas lease covering and affecting what is known as the 'J. A. Bilyou lease' being the Northwest quarter (NW¼) of the Northwest quarter (NW¼) of Section Nine (9), Township Fifteen (15) South, Range Sixteen (16) West, situated in Union County, Arkansas.

3. That certain oil and gas lease covering and affecting what is known as the 'Johnette lease', being the North Three Quarters (N¾) of Fifteen (15) Acres of the East Half (E½) of the Southwest quarter (SW¼) of the Northeast quarter (NE¼) of Section Thirty-three (33), Township Fifteen (15) South, Range Sixteen (16) West, situated in Ouachita County, Arkansas.

This sale includes all buildings, improvements, equipment, appurtenances, machinery and paraphernalia of every kind and character whatsoever, on or belonging to the aforesaid described oil and gas leases, it being my intention to convey all interest appearing in my name, individually and as Trustee of the Mike Lyvers Syndicate, and as Mike Lyvers, Trustee, wherever situated in the Counties of Union, Ouachita and Columbia, in the State of Arkansas, or in any county not herein mentioned in the State of Arkansas, for the reason that all properties appearing in my name in the State of Arkansas, were in truth and in fact purchased with the funds of the Harry Morris Guaranteed Gusher Syndicate No. 3, and said properties were placed in my name for convenience only, and are in truth and in fact the properties of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

To Have And To Hold the same unto the said H. M. Barney, Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupt, and unto his successors and assigns forever.

Witness My Hand on this the 13th day of October, A. D. 1924.

MIKE LYVERS SYNDICATE,
By Mike Lyvers, Trustee,
Mike Lyvers, Trustee,
Mike Lyvers."

The testimony also shows that after the trustee had negotiated a sale of the property to the predecessor of defendant, and that predecessor was examining the title, it was discovered that in the deed to Barney as trustee in bankruptcy the Bilyou lease had been described as being in Union County when it should have been in Ouachita County. Upon such discovery upon application by Barney to Lyvers, he executed another quit claim deed for the purpose of correcting the description of the deed on October 13, 1924. The testimony clearly shows that Barney as Trustee in Bankruptcy had no possession of any property belonging to Mike Lyvers individually. The question now arises what, outside of the
127 order itself, is proper to be considered as to the thing or things covered by the order.

In the case of Russell vs. Place, 94 U. S. 606, 608, the Supreme Court said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In the case of Southern Pacific Railroad Co. vs. United States, 168 U. S. 1, 48, the Supreme Court said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and di-

rectly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In the case of Oklahoma vs. Texas, 256 U. S. 70, 88, the Supreme Court said:

"What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court; there being no suggestion that this is a proper case for resorting to extrinsic evidence."

In each of the opinions above quoted from, authorities were cited in support of the rule stated.

In the case of Coleman vs. Mitchell, 172 Ark. 619, 623, the Supreme Court of Arkansas said:

"It has been held by this court that if a plea of res adjudicata should not be sustained when the issues are practically the same the litigation would not end until the parties had no money or the ingenuity of counsel in suggesting additional grounds in support of the issues has been exhausted. The court further said that the value of a plea of res adjudicata is not to be determined by the reasons which the court rendering the former decree, gave for doing so. Try
128 County Highway Improvements District vs. Vincennes Bridge Co., 170 Ark. 22, 278 S. W. 627. It is the settled doctrine of this court that where a judgment or decree recited that it was heard upon oral evidence and that evidence is not brought in the record by bill of exceptions or other legal means, this court must indulge the presumption that there was sufficient evidence to sustain the decree of the lower court within the issues joined in the proceeding."

In the case of Robertson vs. Evans, 180 Ark. 420, 422, the Supreme Court of Arkansas said:

"The test in determining a plea of res adjudicata is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessary within the issues and might have been litigated in the former suit."

The complaint contains the following allegation:

"On the 13th day of October, 1924, Mike Lyvers at the instance of said H. M. Barney, Trustee in Bankruptcy, ostensibly to carry out the orders of the court in the intervention of Mike Lyvers, executed and acknowledged a certain quit claim deed purporting to convey to the said H. M. Barney, Trustee, for Harry Morris Guaranteed Gusher Syndicate No. 3 oil, gas and mineral leases covering the lands above described."

The complaint also alleges:

"That said deed referred to in the last paragraph was not executed by the said Mike Lyvers under and in keeping or in compliance with the order of the Honorable Frank A. Youmans, Judge, which was an order to the said Mike Lyvers personally to quit claim and did not include any order or direction to the said Mike Lyvers to execute a quit claim deed to said property as trustee of the said Mike Lyvers Syndicate, and that the same was executed by the said Lyvers in the belief that he was acting in compliance with the order of the court made and entered in this intervention of the Harry Morris Guaranteed Gusher Syndicate No. 3, bankruptcy matter, which in fact was not true, as shown by the order of the court heretofore filed as an exhibit herein."

The testimony shows that the order requiring the execution of the deed was not made by the judge but was made by the referee. It also shows that the deed was made after the order of the referee had been affirmed by the court. The allegation is that it was executed by Lyvers; and that he was acting under belief that he was complying with the order of the court. His belief was entirely justified. His execution of the deed shows that he understood what was meant by the order. His subsequent execution of a correction deed was made under the same belief. The same belief was entertained by Barney. It is clear that the same belief was entertained by the attorney of the predecessor of the defendant who examined the title, and that it was under the same

belief that the predecessor of defendant paid the pur-
129 chase price and accepted the deed from Barney as trustee in bankruptcy. The distinction sought to be made by the plaintiffs between Lyvers as an individual and as trustee, is opposed to the entire record of the case, and to the extrinsic evidence. Whatever may be said as to the different capacities in [shich] Lyvers acted, it is obvious that his identity remained unchanged.

In the case of Linton vs. Omaha Wholesale Produce Market House Co., 218 Fed. 331, 335, the Court of Appeals for the Eighth Circuit, said:

"It is contended by appellant's counsel that, as Adolphus F. Linton was not impleaded in the Becker suit as trustee, but as an individual, in his own right, he cannot be estopped from prosecuting this suit, in which he appears in his capacity as trustee for his children, by the judgment rendered against him in that suit. Here, too, we think the assumption is unfounded. It is true he was not designated in the caption of the Becker suit as a trustee, but averments are found throughout the bill in that suit which most clearly disclose that he was there charged with making a claim to the lots in question solely as trustee for his children. It is quite common and altogether proper to describe the capacity of a named defendant or his relationship to other parties in the body of the bill, without disclosing them in the style of the action at all. Not only so, but the defendants in the Becker case pleaded affirmatively that Mr. Linton held title to the lots in question for his children, and the case was tried on that issue. That issue was, therefore, not only made, but fully tried, in the Becker suit."

In the case at bar the intervention of Lyvers taken in connection with the exhibit attached thereto, shows that he sought to have taken from the possession of Barney, the trustee in bankruptcy, and delivered to him, the Bilyou forty acres, and the testimony shows that the only title he had thereto was as trustee for the Mike Lyvers Syndicate. The order of the referee shows that his intervention was denied and he was ordered to make a deed to Barney for the reason that there was such a commingling of properties of the Mike Lyvers Syndicate, and of the Guaranteed Gusher Syndicate No. 3, and such a joint operation that they could not be separated. The deed was made to Barney by Lyvers as an individual and as a trustee. In his exhibit to his intervention Lyvers had specifically asked for "any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers, Trustee. in Union and Ouachita Counties, Arkansas."

By the Declaration of Trust Lyvers became trustee of an express trust. Section 1 of Article 10 of that Declaration reads as follows:

130 "The trustee of this trust estate shall be self perpetuating and as such trustee shall own in his own name the legal title to the corpus of the trust and shall have the absolute management and control of the whole and entire res or corpus, both in present and future, including the power of sale, pledging, mortgaging, bonding and the incumbrancing in any manner or form whatsoever, together with the absolute power of alienation, substitution and distribution as in these articles provided."

In the case of Kerrison vs. Stewart, 93 U. S. 155, 160, Chief Justice Waite speaking for the court, said:

"It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust."

The testimony clearly shows that Lyvers occupied such a position in this case. It was not necessary for the Mike Lyvers Syndicate to have been a party with him in his intervention, nor was it necessary for the Mike Lyvers Syndicate to be joined with him in the order made by the referee. Cary vs. Brown, 92 U. S. 171, Ross vs. City of Ft. Wayne, 63 F. 466, Dickinson vs. Harris, 48 Ark. 355, Hunter vs. Robins, 117 F. 920.

In its opinion in this case, the Court of Appeals said:

"The execution of the quit claim deed of this property viewed as a voluntary act without consideration was therefore made without authority and was a plain breach of the obligations of the trust."

In the light of the testimony the execution of either one of the quit claim deeds by Lyvers was not a voluntary act. The deed was made pursuant to an order of court. Therefore, the act cannot be said to be voluntary. It is clear that he did not want to make it. The order of court did not require that

a consideration should be paid him. Therefore, the absence of a consideration is not a factor in the case.

My conclusion is

1. That the Referee had jurisdiction to make the order.

2. That the order required Mike Lyvers to convey to Barney, as trustee in bankruptcy, the Bilyou lease in the names of Mike Lyvers, Trustee, and Mike Lyvers Syndicate, and

3. That the effect of such deed was to vest title in H. M. Barney, Trustee in Bankruptcy.

131 The second defense set up in the answer is that of res adjudicata based upon another order of the Referee.

After the execution of the first quit claim deed by Lyvers the Truste in Bankruptcy reported to the Referee an offer of purchase of all of the property in his possession, including the leases to the Mike Lyvers Syndicate. The sale was approved by the Referee. Under the contract the purchaser took immediate possession of all the property but was allowed time in which to investigate the title. Before a deed was executed by the Trustee in Bankruptcy L. J. Zug, F. O. Wilson and Joseph P. Zimmer as unitholders of the Mike Lyvers Syndicate for and on behalf of themselves and all other unitholders of the Mike Lyvers Syndicate filed a petition before the Referee. A response to that petition was filed by the Trustee in Bankruptcy, Barney. Upon the hearing the prayer of the petition was denied. No review of the order of the Referee was sought or had.

After setting out in their petition, first, the organization of Mike Lyvers Syndicate, Mike Lyvers Trustee, by the Declaration of Trust filed February 21, 1923; second, the creation under said Declaration of Trust of beneficiary interests represented by certificates of a par or face value of ten dollars each; third, that petitioners are holders of such certificates and that they appear for themselves and on behalf of all persons similarly situated; fourth, that the business of the trust estate was the buying and selling of oil and gas leases and the development of such leases for oil and gas, and that field of activity of said trust estate was in Union and Ouachita Counties, Arkansas; fifth, that the business of the trust estate was carried on in the name of Mike Lyvers, Trustee, the petition proceeds as follows:

"That your petitioners are informed and believe, and on such information allege that said trust estates were integral

and independent entities, and that the business of said trust estates in buying, selling, developing and operating oil and gas leases was an independent business and had no legal connection with any other similar trust estate or corporation or partnership or individual so engaged in the same or allied business, but that for convenience and economy of operation your petitioners are informed and verily believe, and on such information so allege that there was a working arrangement between the said Mike Lyvers and one Harry N. Morris, who was in turn the trustee of a trust estate under the name and style of the Harry Morris Guaranteed Gusher Syndi-
132 cate No. 3, Harry N. Morris, Trustee, but that said working arrangement was in no way a pooling of interests for common profit or liability, nor an agreement of suretyship or responsibility, nor did it constitute an assumption of liability of one trustee for the debts or liabilities of the other trustee. That each Trustee and their respective trust estates were alone and solely responsible and liable for their own debts and liabilities, and that the only purpose of the intangible working arrangement was economy of operation and convenience.

That under such arrangement the trust estates of Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, did not either by affirmation, act, acquiescence or otherwise assume for said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, any liability of any kind or character whatsoever, nor did the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, hold out or present to the business world, nor permit to be held out and advertised or stated to the business world that said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, or their estates were directly or indirectly chargeable with the debts and liabilities of Harry N. Morris or the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

That Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, were alone and solely responsible for their own debts and liabilities and only their own debts and liabilities were chargeable against their property or properties, and that their debts and liabilities in turn were not chargeable against any other properties whatsoever, including the properties of Harry N. Morris and Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

VI.

That on or about the 29th of August, 1923, a receiver was appointed by the Honorable George M. LeCroy, Chancellor of the Second Division of the Chancery Court of Union County, Arkansas, of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, at the instance of Bender Iron & Supply Company and other creditors; that W. H. Williford was appointed as such receiver and duly qualified and took charge of the assets of said Harry Morris Guaranteed Gusher Syndicate No. 3; that at the time of said appointment of said Williford as said receiver the operating leases of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, were being operated by the Harry Morris Guaranteed Gusher Syndicate No. 3 for the purpose of economy in operation as heretofore set out, and that in taking over possession of the properties of the Harry Morris Guaranteed Gushers Syndicate No. 3, said Williford, as receiver, came into possession of the leases owned by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, were not named as defendants in said suits against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, nor were the commercial debts and liabilities of said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers Trustee then owing, other than the current monthly expenses for their proportion of the operating costs under their mutual working arrangement, as hereinbefore stated.

That said Williford as receiver continued to operate said operating leases of the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, and received therefrom the profits and revenues, and that no accounting was
133 had by said receiver between the Harry Morris Guaranteed Gusher Syndicate No. 3 and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, and your petitioners are informed and believe, and on such information allege, that there was no demand made by said Williford nor attempt made by said Williford, receiver, to secure an accounting, nor to determine the liabilities, if any, then owing by the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, to the estate of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, or any other person or persons.

VII.

That during the course of the administration of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, by said Williford as receiver, that said Williford

requested of Mike Lyvers, instead of an accounting and a settlement with the said Mike Lyvers, giving to him, the said receiver, security for the operating costs and any undetermined liability that there might be found to be owing by the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, then in the hands of said Williford as said receiver, and thereupon the said Mike Lyvers delivered to said Williford, receiver, a deed to the property of said syndicate, to be held by the said Williford, receiver, as such security until such time as a determination might be made of the liability, if any, owing to or that might be charged against the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, by or on behalf of Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee.

VIII.

That on or about the 23rd day of December, 1923, a petition in bankruptcy was filed by Willis B. Cauble, Adelaide Higbee and Harry L. Beard, against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, in the United States District Court for the Western District of Arkansas, Texarkana Division, and H. M. Barney was appointed by the Honorable Court temporary receiver of said Harry Morris Guaranteed Gushers Syndicate No. 3, Harry N. Morris, Trustee; that on or about the 30th day of December, 1923, upon answer filed, adjudication was had and the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, was declared bankrupt, and the case referred to Honorable Gustavus G. Pope, one of the referees in bankruptcy for said district. That on or about the 30th day of January, 1924, at a meeting of the creditors, duly called by said referee, H. M. Barney, then the temporary receiver in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, was appointed Trustee in Bankruptcy of said bankrupt.

That on or about the .... day of ....., 19.., a petition in bankruptcy was filed in the United States District Court for the Western District of Arkansas, Texarkana Division, against Harry Morris personally. An adjudication was had thereon on the ... day of ....., 19.., and the said Harry N. Morris was adjudicated a bankrupt and the case referred to the Hon. Gustavus G. Pope, one of the referees in bankruptcy for the district, whereupon the Referee consolidated the bankruptcy of Harry N. Morris personally with the bankruptcy of the Harry Morris, Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

IX.

Your petitioners are informed and verily believe, and on such information allege that there has been no petition in bankruptcy filed nor has there been an adjudication in bankruptcy against either the Mike Lyvers Syndicate, Mike
134 Lyvers, Trustee, and or Mike Lyvers, Trustee.

X.

That said H. M. Barney, as receiver took over from the said Williford all and sundry, the several leases and other property held by him as receiver, the estate and property of the Harry Morris Guaranteed Gusher Syndicate No. 3, and the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, in the hands of the said Williford, for convenience of operation under the working agreement heretofore herein set out, including the deed given as security by the said Mike Lyvers, Trustee, to hold harmless the said receiver Williford and the assets of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, from loss and damage by the operation of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, in common with the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

Your petitioners are informed and verily believe, and on such information allege that the said H. M. Barney, Trustee in Bankruptcy, has operated the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, without an accounting thereof, and without any attempt to make an accounting as between the said Syndicates, Mike Lyvers Syndicate, Mike Lyvers, Trustee and Mike Lyvers, Trustee, with the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and that said Barney, as Trustee, has received the profits and revenue arising from, through and out of said operation without accounting or attempting to account for same or to obtain a determination of the liabilities, if any, owed by the said bankrupt estate, for or on behalf of the said Mike Lyvers Syndicate, Mike Lyvers, Trustee and or Mike Lyvers, Trustee, nor has the said Barney, Trustee in Bankruptcy, made or attempted to make any determination of the liabilities for any debts or obligations of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, to said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, nor to determine the liabilities, if any, owed by the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N.

Morris, Trustee, bankrupt, to said syndicate, Mike Lyvers Syndicate, Mike Lyvers Trustee, and or Mike Lyvers, Trustee.

XI.

Petitioners state that the trustee herein above referred to, Mike Lyvers, has heretofore executed conveyances to H. M. Barney, Trustee in Bankruptcy. Petitioners verily believe that the conveyances executed by the said Mike Lyvers were void and constituted a fraudulent conveyance of the beneficial interest of your petitioner and other similarly situated and should be cancelled and held for naught and for their reasons respectfully state that they are informed that the first of said conveyances by the said trustee was procured from said trustee, Mike Lyvers, by threats and by causing said trustee to believe that the court had ordered same executed and that the last of said conveyances were executed by the said trustee for the sole reason that he netted Six Hundred Dollars ($600.00) out of the bankrupt estate of the Harry Morris Guaranteed Gusher Syndicate No. 3. Petitioners allege that if such facts are true that it is clearly in violation of the rights of the beneficial owners of the corpus of the Mike Lyvers Syndicate. Petitioners attach hereto and make a part hereof an affidavit executed by the said Mike Lyvers, Trustee and mark same "Exhibit B'.

135 XII.

That your petitioners are informed and believe, and on such information allege that among the properties owned in fee, or in which said Mike Lyvers Syndicate, Mike Lyvers, Trustee, or Mike Lyvers, Trustee, owns a substantial interest in the oil and gas lease known as the Bilyou Farm, being the North West Quarter of the Northwest Quarter (NW¼ of NW¼) of Section Nine (9), Township Fifteen (15) South, Range Sixteen (16) West, Union County, Arkansas; that said lease above described is located in the very heart of what is known as the deep sand area of the Smackover Oil Field and that said deep sand has been proven by large flowing wells in the immediate proximity of the above said described Bilyou Farm, and that by reason of flowing wells that said lease has become highly valuable, in fact that it is worth many thousand of dollars.

XIII.

That your petitioners are informed and verily believe, and on such information allege that the said H. M. Barney, Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, has without due

process of law, attempted to charge the assets of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, with certain of the debts and obligations, or with all of the debts and obligations of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee. That he has, as such Trustee, attempted to claim and to maintain absolute ownership of said properties of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, by reason of said deed given by Mike Lyvers to W. H. Williford as security, instead of holding said properties as security for any determined indebtedness owed by Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, to the said Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, or that might be owed by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, to any person or persons that might in turn be chargeable through such person or persons against the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee.

XIV.

That you petitioners are informed and believe, and upon such information allege that purported deed of conveyance from Mike Lyvers to H. M. Barney was in direct dereliction of the rights and interests of your petitioners and of other so-called cestui que trustants, or unitholders, and was made without consideration and value to said trust estates, Mike Lyvers Syndicate, Mike Lyvers Trustee and Mike Lyvers, Trustee.

XV.

That your petitioners are informed and believe, and upon such information allege that no notice has been given by the Referee in Bankruptcy to the so-called cestui que trustants, or unitholders, of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, of any pending action, or actions, wherein their property or rights were in jeopardy by reason of the attempted seizure and retention of the property of said Syndicates by the Trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, although the Trustee in bankruptcy, H. M Barney, and the Honorable Referee in Bankruptcy have had in their possession since the 22nd day of December,
136 1924, the books and stubs of said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, giving the names and addresses of said unitholders.

XVI.

Your petitioners are informed and believe, and upon such information allege that the said Trustee in Bankruptcy, H. M. Barney, has attempted to sell all of the property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and in said sale has attempted to include some or all of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, including valuable Bilyou Farm, herein previously described and referred to, to the irreparable loss and injury of your petitioners and all other so-called cestui que trustants, or unitholders, of said Mike Lyvers Syndicate, Mike Lyvers, Trustee and or Mike Lyvers, Trustee."

The prayer of the petition was as follows:

"Wherefore, the premises considered, your petitioners will pray:

I.

That the alleged sale by the Trustee in bankruptcy, H. M. Barney, of the residue of the estate of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, to the Natural Gas & Petroleum Corporation, approved by the Honorable Referee on January 23rd, 1925, be set aside so far as it applies to any of the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, or Mike Lyvers, Trustee.

II.

That an accounting be had between the said Trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, and that the amount of indebtedness, if any, owed by the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and of Mike Lyvers, Trustee, to the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and or to any other person, or persons, that might be chargeable, against the assets and property of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, bankrupt, and upon such determination that the property of the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, be chargeable only with such amount as is so determined.

III.

And that the said H. M. Barney be forthwith directed to restore the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and

Mike Lyvers, Trustee, their property, and that the alleged deed of conveyance from Mike Lyvers, Trustee, to H. M. Barney, Trustee in Bankruptcy, be cancelled and declared void and of no effect other than as surety for any debt or debts justly due by said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, that would be chargeable against such assets in favor of the Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, either directly or through other person or persons, and for such other and further relief as petitioners may be entitled to."

137 To that petition, the Trustee in Bankruptcy filed a reply putting in issue all allegations of fact in the petition. A hearing was had and the Referee in Bankruptcy made the following order:

"Order Denying Petition of L. J. Zug, F. O. Wilson and Joseph P. Zimmer.

At Texarkana, in the said District, on this March 18, 1925, before Gustavus G. Pope, one of the Referees in Bankruptcy of said Court, the following proceedings were had in said cause:

L. J. Zug, F. O. Wilson and Joseph P. Zimmer, through their attorney, R. M. Hutchins, of El Dorado, Ark., filed their objections to the sale and petition for accounting of the Mike Lyvers estate, and same is heard upon the petition, the objections and response of the trustee, the testimony and papers in connection with the intervention of Mike Lyvers filed herein claiming the property set out in the petition, the testimony and claim of Mike Lyvers, and the quit claim deeds from Mike Lyvers, and various records and papers in this estate.

After due consideration the referee finds that Mike Lyvers intervened for the property described, and after hearing same, it was found that the property belonged to the bankrupt, and a part of the Morris estate, and that said order was reviewed by the District Judge and affirmed and the Mike Lyvers ordered to execute deed and other conveyances to the trustee in Bankruptcy, which was done. It further appears that Mike Lyvers was merely working for a salary of $250.00 per month, and the balance of his wages amounting to $1000 were allowed after a hearing upon same and the objections thereto. It appears that Harry Morris, Otto Mor-

ris and D. A. Morris had several series of units and purported to be separate estate when in fact they were all the same and handled as one institution. The petitioners do not set out any ground for a setting aside of the sale of the assets to the Natural Gas & Petroleum Co.

It is therefore ordered that said petition be and the same is hereby denied both as to the sale and as to a separate account of the purported funds of the Mike Lyvers estate."

The testimony shows and the petition states that the Trustee in Bankruptcy had possession of the leases. An order was sought exempting those leases from the sale and the delivery of them to the petitioners for themselves and other unitholders. The petition set out the reasons why Mike Lyvers took no action as Trustee and that the deeds he had executed to the Trustee in Bankruptcy were void. The prayer of the petition asked for an accounting as between Harry Morris Guaranteed Gusher Syndicate No. 3 and the Mike Lyvers Syndicate.

138 The referee had jurisdiction

(a) Because the petitioners invoked that jurisdiction for the purpose of securing the relief that they asked for, and

(b) Because the property involved was in the possession of the Trustee in Bankruptcy acting under the orders of the Referee and claimed as part of the bankrupt estate.

It is contended on behalf of the plaintiffs that the order of the referee upon that petition affected only the three unitholders who presented the petition. On behalf of the defendant it is claimed that the petition of the three unitholders was a representative or class suit, and that the order thereon was binding upon all persons belonging to that class. The testimony clearly shows that the unitholders of the Mike Lyvers Syndicate were widely scattered throughout the United States. It is alleged in the amendment to the complaint "That the unitholders of Mike Lyvers Syndicate were scattered over the United States, none of whom as far as plaintiffs could discover, being then or now residents of Arkansas." It was clearly impracticable to bring them all before the court.

Equity Rule No. 38 reads as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make

it impracticable to bring them all before the court, one or more may sue or defend for the whole."

In the case of Supreme Tribe of Ben-Hur vs. Caudle, 255 U. S. 356, the Supreme Court held that under the rule above quoted in a representative or class suit the members of the class not directly parties to the suit were bound by the judgment or decree.

Section 1098 of Crawford & Moses' Digest of the Statutes of Arkansas covers the same proposition. That section reads as follows:

"Where the question is one of a common or general interest of many persons or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

An application of that rule was made in the case of Howard-Sevier Road Improvement District No. 1 vs. Hunt,
139 166 Ark. 62, 69, in which it was held that a decree of the Federal Court in a suit to which the Commissioners of the Improvement District were parties, was res adjudicata in another suit by taxpayers in the improvement district.

[The] alleged that the deed executed by Lyvers to Barney the trustee in bankruptcy, was fraudulent, and also alleged that the deed was obtained from Lyvers "by threats and by causing said trustee to believe that the court had ordered same executed, and that the last of said conveyances was executed by the said trustee for the sole purpose that he netted $600.00 out of the bankrupt estate of Harry Morris Guaranteed Gusher Syndicate No. 3."

The effect of those allegations was that Lyvers had violated his trust. Those allegations were sufficient reasons for independent action on the part of the unitholders. Lowenthal vs. Georgia Coast & P. R. Co., 233 Fed. 1010.

The conclusion is that the order of the Referee on the petition of Zug, et al., is res adjudicata in this case.

The third defense set up in the answer is that of laches on the part of the plaintiffs. That defense is necessary to be considered only in the event that the first and second defenses are not sustained.

The plaintiff Page sues as successor trustee of Lyvers. Page is not a purchaser for value. He has no better stand-

ing in court than Lyvers would have had. The amendment to the complaint allowed by the Court of Appeals sets up facts intended by plaintiffs to explain the delay in bringing this suit.

Anticipating the defense of laches the Court of Appeals made the following comment:

"The defense of laches is dependent on the fact that the quit claim deed was dated October 13, 1924. The conveyance of the bankruptcy trustee to the Petroleum Corporation was made on March 2, 1925, and this suit was brought on December 20, 1927, summons of that date being served on January 4, 1928."

Lyvers knew in November, 1923, of the claim that was made on the Bilyou lease by Williford, the receiver appointed by the State Court. Later in the same month Lyvers knew the claim that was made by Barney as receiver in
140 bankruptcy, and after that, as trustee in bankruptcy. Lyvers also knew that two of the leases belonging to the Mike Lyvers Syndicate which were producing oil were operated by the trustee in bankruptcy, and that the proceeds from the sale of the oil produced were held by the trustee in bankruptcy as belonging to the estate of Guaranteed Gusher Syndicate No. 3.

After the affirmance of the order of the Referee requiring him to execute deed to the trustee in bankruptcy, and after compliance with that order, Lyvers later in order to correct the description of the property conveyed, executed another deed to the trustee in bankruptcy.

The leases on the Bilyou forty acres contained provisions for the payment in addition to the royalty, the sum of $32,000.00 out of the oil produced from the leases. The effect of those provisions rendered the leases of little value at the time the petition in bankruptcy was filed in November, 1923. This situation continued during the year 1924 to the time the contract of sale was entered into between the trustee in bankruptcy and the predecessor of plaintiff. The development of adjacent property to the Bilyou forty gave value to the leases on that forty. Lyvers knew of the changed conditions. The unitholders had notice that the property was being claimed by the trustee in bankruptcy as part of the bankruptcy estates of the Guaranteed Gusher Syndicate No. 3, and of Harry Morris individually. Lyvers and the unitholders had notice also that a contract of sale had been made. With that knowledge Lyvers executed the

correction deed. With the same knowledge Zug and his associates did not press their intervention beyond the order of the Referee denying the relief prayed. The deed of the trustee in bankruptcy to the predecessor of defendant was executed March 2, 1925. The predecessor began the drilling of wells on the property in 1925. Four producing oil wells were brought in during April and May of that year at an expense of $102,926.40. During the year 1925 the purchaser paid also the $32,000.00 out of the oil produced, and $265.33 miscellaneous costs, making a total of $135,191.73. This development was undertaken and carried on by the pur-
141 chaser under the belief that it had good title. The failure of Lyvers to act is sought to be explained in the amendment filed by the plaintiffs. The second paragraph of that amendment reads as follows:

"Petitioner shows that Mike Lyvers was under indictment at the time the proceedings were taken before the referee, and before the district court, and that on the 13th day of October, 1924, the said Mike Lyvers having pleaded guilty under an indictment alleging conspiracy to defraud unitholders in Mike Lyvers Syndicate and other associations, was under a suspended sentence."

While that allegation is not denied in the answer, it developed at the hearing that the sentence of Lyvers was not suspended and that the sentence imposed was a fine. But if the sentence had been suspended that fact would not have prevented Lyvers from taking action to secure possession of the property involved in this suit. On the contrary, it would have left him free to act.

After the adverse ruling on his intervention, and the order requiring him to execute a deed to the trustee in bankruptcy, the first activity shown by Lyvers appears in the testimony of Mr. Loony, one of the attorneys for plaintiffs. Mr. Looney said:

"Well, Mike Lyvers made a contract in October, 1925,—I got the exact date from records kept by Mr. Powell in his office—October 19, 1925, with Mr. Powell and his firm and myself to represent him in bringing the suit. Subsequent to that date Mike Lyvers resigned and appointed Mr. Page and Mr. Page retained us in the suit."

This was more than four months after the four wells had been drilled and the expense incurred.

Mr. Looney testified further as follows:

"Mr. Powell took charge of the filing of the papers which were filed first, I believe, as counsel has stated in January, 1926, instead of December, 1925, when they were drawn up, and he and his firm appeared before Judge Trieber first in connection with a motion which was filed by Mr. Davis attacking the jurisdiction in the case."

The motion was sustained by Judge Trieber on the 18th of April, 1927. Afterwards this suit was begun in the state court on December 20, 1927, eight months and two days after the dismissal of the suit in the United States District Court for the Eastern District of Arkansas. In the meantime there had been other wells drilled on Bilyou forty and additional expenses incurred. The question now is
142 whether those facts will sustain the defense of laches.

In the case of Jackson vs. Jackson, 175 Fed. 710, it was held that a delay of three years to assert a claim to an equitable interest in coal lands was sufficient to sustain the defense of laches.

In the case of Patterson vs. Hewitt, 195 U. S. 309, 321, Mr. Justice Brown, speaking for the court said:

"There is no class of property more subject to sudden violent fluctuations of value than mining lands. A location which today may have no saleable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose when suddenly a mass of rich ore may be discovered from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

In that case it was also said:

"Indeed in some cases the diligence required is measured by months rather than by years * * * And in others a delay of two or three or four years has been held fatal."

In the case of Taylor vs. Salt Creek, etc. Oil Co., 285 Fed. 532, 539, Judge Kenyon, speaking for the Court of Appeals, said:

"The nature of the property in dispute may require more prompt action than otherwise. This is especially true as to mining and oil properties, such as the situation in the case at

bar. There is a special reason as to these properties why the court should hold the parties to a rigorous rule as to laches."

See also Hays vs. Port of Seattle, 251 U. S. 233.

The same rule is recognized by the Supreme Court of the State of Arkansas. In the case of Sanders vs. Flenniken, 180 Ark. 303, decided November 11, 1929, that court in that case sustained a plea of laches under conditions similar to those presented here.

While the record discloses that a suit was brought by the plaintiff Page in December, 1925, in the United States District Court for the Eastern District of Arkansas, the purchaser of the property from the trustee in bankruptcy had already expended large sums in the development of the property. The property itself is located in Ouachita County in the Western District of Arkansas and the defendant's place of business was and is at El Dorado in that district. No satisfactory reason is given for the bringing of the suit
143 in the Eastern District of Arkansas, and none for the delay after that suit was dismissed.

Plaintiffs now say that an accounting sought by them against the defendant would require the defendant to pay the amount represented by the difference between the sum received for oil produced and the amount expended for such production.

In the case of Patterson vs. Hewitt, supra, the same contention seems to have been made. With regard to that contention the court said:

"While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught."

The conclusion is that the defense of laches must be sustained.

FRANK A. YOUMANS, Judge.

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144 Rulings on Objections to Testimony.

Filed in U. S. District Court November 29, 1930.

The following objections by the plaintiffs to testimony are overruled, as follows:

1. Objection to the testimony of H. L. Williford in which he details a conversation had with Mike Lyvers. (P. 78 of Reporter's transcript of the testimony).

2. Objection to the testimony of H. M. Barney with reference to a conversation with Mike Lyvers. (P. 107 of Reporter's transcript of the testimony).

3. Testimony of H. M. Barney with reference to a conversation had with Mike Lyvers (P. 108).

4. Testimony of Dr. McComb with reference to conversation had with Mike Lyvers (P. 226).

5. The motion of plaintiffs to exclude all testimony tending to show notice to unitholders.

An exception is noted by the plaintiffs to each of said rulings.

FRANK A. YOUMANS, Judge.

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145 (Findings of Fact and Conclusions of Law of District Court.)

Entered in U. S. District Court December 15, 1930.

Findings of Fact.

1. The 40 acre tract of land called the Bilyou lease was claimed by H. L. Williford, in his capacity as receiver of the property of Harry Morris Guaranteed Gusher Syndicate No. 3, under appointment by the Chancery Court of Union County, Arkansas.

2. Afterwards, in November, 1923, possession of the same 40 acre tract was taken by H. M. Barney, under appointment as receiver by the United States District Court for the Western District of Arkansas, Texarkana Division, in a suit in bankruptcy against Harry Morris Guaranteed Gusher Syndicate No. 3, in which suit H. M. Barney was afterwards elected trustee in bankruptcy.

3. The possession of the 40 acre tract by Barney, both as receiver and as trustee in bankruptcy, was recognized by Mike Lyvers, and he presented to the referee in bankruptcy a petition praying that an order be made that Barney the trustee in bankruptcy be ordered to deliver to said Mike Lyvers the Bilyou tract, together with other leases.

4. The record title to the Bilyou lease was in Mike Lyvers Syndicate, Mike Lyvers, Trustee.

146 5. By his own declaration of trust Mike Lyvers was sole trustee of Mike Lyvers Syndicate, and, by the same declaration, he was a trustee of an express trust.

6. As trustee of an express trust he could sue and be sued in his own name.

7. To the petition of Mike Lyvers the trustee in bankruptcy filed a response denying ownership by Mike Lyvers and alleging that the leases were the property of Harry Morris Guaranteed Gusher Syndicate No. 3, and praying for a summary order requiring Mike Lyvers to execute a deed for the leases to the trustee in bankruptcy.

8. The referee denied the petition of Lyvers and granted the petition of the trustee in bankruptcy.

9. On review of the order of the referee on the petition of Lyvers, the order was affirmed by the court.

10. Lyvers then complied with the order of the referee and executed a deed to the trustee in bankruptcy conveying to him the lease in question together with other leases.

11. Afterwards Barney, as trustee in bankruptcy, entered into a contract of sale of all of the property of the bankrupt, including the Bilyou lease, which contract was approved by the referee.

12. On examination of the title the attorney for the purchaser discovered that the deed executed by Lyvers described the Bilyou lease as being in Ouachita County, when in fact it was in Union County.

13. On request of Barney, Lyvers executed to him another deed containing a correct description of the Bilyou lease.

147 14. On approval of the title by the attorney for the purchaser the trustee in bankruptcy executed to it a deed for property, including the Bilyou lease.

15. At the time the contract of sale was entered into the Bilyou lease had little value, by reason of a provision in the lease for the payment to the lessor of the sum of $32,000.00 out of the oil to be produced from the land.

16. On March 18, 1925, three unit holders in the Mike Lyvers Syndicate, on behalf of themselves and all other unit holders of the said Syndicate, filed a petition praying:

(a) That the sale by the trustee in bankruptcy, so far as it applied "to any property of the Mike Lyvers Syndicate,

Mike Lyvers Trustee, or Mike Lyvers, Trustee," be set aside;

(b) That an accounting be had between the Harry Morris Guaranteed Gusher Syndicate No. 3, "and the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee", with reference to the property of the "Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee."

(c) That H. M. Barney, "be forthwith directed to restore the Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Mike Lyvers, Trustee, their property, and that the alleged deed of conveyance from Mike Lyvers, Trustee, to H. M. Barney, Trustee in Bankruptcy, be cancelled and declared void and of no effect other than as surety for any debt or debts due by said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and or Mike Lyvers, Trustee, that would be chargeable against such assets in favor of the Harry Morris Guaranteed Gusher Syndicate No. 3."

17. Said petition was denied by the referee.

18. The trustee in bankruptcy, by deed dated March 2, 1925, conveyed all of the property of the bankrupt, including the Bilyou lease, to the predecessor of the defendant.

19. After the execution of the deed by the trustee in bankruptcy in March and April, 1925, the predecessor of the defendant drilled four wells on the Bilyou lease at an expense of more than $100,000.00.

20. Other wells were drilled on the lease in the summer of 1925.

148 21. All of the wells drilled, with the exception of two, produced oil in large quantities, and the receipts from the sale of the oil were very much larger than the amount expended in development and operation.

22. In October, 1925, Mike Lyvers employed attorneys to bring suit for himself as trustee of the Mike Lyvers Syndicate and the Mike Lyvers Syndicate to establish his claim as trustee for the Mike Lyvers Syndicate to the Bilyou lease, but no suit was brought under that employment.

23. In October, 1925, Mike Lyvers resigned as trustee of the Mike Lyvers Syndicate and appointed as his successor John H. Page.

24. In January, 1926, John H. Page, as successor trustee of the Mike Lyvers Syndicate, brought suit in the District Court of the United States for the Eastern District of Arkansas against the predecessor of defendant.

25. The Bilyou lease is in Union County, in the Western District of Arkansas, and the place of business of the predecessor of defendant was in El Dorado, in said Western District.

26. In April, 1927, the suit was dismissed for want of jurisdiction.

27. In December, 1927, this suit was brought in the Chancery Court of Union County, Arkansas, and later was removed to this court.

28. The lease had been fully developed before the suit was brought in the Eastern District of Arkansas.

29. After the dismissal of that suit several months intervened before the bringing of the suit in the Chancery Court of Union County.

30. The unit holders of the Mike Lyvers Syndicate
149 had notice of the pendency of bankrupt proceedings against Harry Morris Guaranteed Gusher Syndicate No. 3, and that the Bilyou lease was claimed by the trustee in bankruptcy as belonging to the estate of the bankrupt, and they had this notice from the date of the execution of the deed, October 13, 1924, by Mike Lyvers to the trustee in bankruptcy, to the date of the execution of the deed, March 2, 1925, by the trustee in bankruptcy to the predecessor of the defendant, and thereafter to the bringing of this suit.

Conclusions of Law.

1. The summary order of the referee, and its affirmance on review, constituted a judgment binding upon Mike Lyvers as Trustee of Mike Lyvers Syndicate, and on plaintiff John H. Page, as successor trustee.

2. That the denial by the referee of the petition of the three unit holders on behalf of themselves and all other unit holders of the Mike Lyvers Syndicate was a judgment binding, not only on the three petitioners but also upon all other unit holders.

3. That Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, and John H. Page, as successor trustee, and the

unit holders of the Mike Lyvers Syndicate, were guilty of laches in asserting their claims to the Bilyou lease.

FRANK A. YOUMANS, Judge.

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150 Decree.

Entered in U. S. District Court December 17, 1930.

John H. Page, Trustee for Mike Lyvers Syndicate, et al., Plaintiffs,
No. 47. vs. In Equity.
Arkansas Natural Gas Corporation, Defendant.

This cause came on to be heard upon the merits at this term, and was argued by counsel; and thereupon, upon consideration thereof, the court doth find the issues in favor of the defendant.

It is, therefore, considered, ordered, adjudged and decreed that the plaintiffs take nothing by this suit; that this cause be and the same is hereby dismissed for want of equity, and that the defendant do have and recover of and from plaintiffs all of its costs herein expended.

FRANK A. YOUMANS,
District Judge.

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151 Notice of Lodgment of Tendered Statement of Evidence, With Return.

Filed in U. S. District Court December 31, 1930.

To Arkansas Natural Gas Corporation, Jeff Davis, Solicitor, El Dorado, Arkansas, and Moore, Gray & Burrow, Solicitors, Little Rock, Arkansas:

Please to be informed that the plaintiff John H. Page has prepared a statement of evidence, and has, this 27th day of December, 1930, lodged it in the Clerk's office at Fort Smith, Arkansas, for your examination, and has at the same time filed with the clerk a praecipe, of which a copy is herewith enclosed for you, indicating a portion of the record to be incorporated into the record on his appeal. He will ask the court to approve this statement on Tuesday, January 6th,

1931, at 10 o'clock A. M. or as soon thereafter as counsel can be heard at Fort Smith, Arkansas.

JORDAN SELLERS,
PAT McNALLEY,
FRANK J. LOONEY,
J. M. GRIMMET,
YANDELL BOATNER,
Solicitors for Plaintiff.

Received this writ at Little Rock, Arkansas, December 29, 1930, and executed same on Moore, Gray & Burrow by delivering a true and correct copy of the writ, it being a Notice to Clifton W. Gary, he being a member of the firm, Little Rock, Arkansas, this 29th day of December, 1930.

G. L. MALLORY,
U. S. Marshal, Eastern District of Arkansas.
By W. F. Freeman,
Deputy U. S. Marshal.

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152 Approved Statement of Evidence.

Filed in U. S. District Court Jan. 6, 1931.

John H. Page, Trustee, Plaintiff,

vs.

Arkansas Natural Gas Corporation, Defendant.

Plaintiff's Testimony.

JOHN H. PAGE.

Witness is Trustee for the Mike Lyvers Syndicate, plaintiff in this action. In October, 1925, Mr. Snead Powell, an attorney of Camden, Arkansas, was employed in this litigation and came to Little Rock and discussed it with me. Subsequently Mr. Powell died. His firm handled it for some months, and then became disconnected with the case, and Mr. Looney of Shreveport, Louisiana, one of the present counsel, was associated.

After Powell's death I consulted Frank Pace, an attorney of Little Rock who, about two months later, reported that he could not take the case. Subsequently I took up the matter with Judge T. M. Mehaffy and employed him. Subsequently, Judge Mehaffy was appointed to the Supreme bench, and I then took the matter up with Mr. McHaney, who took the

case, but who was subsequently appointed a member of the State Supreme Court. I then saw the firm of Carmichael and Hendricks, who accepted employment in the case.

The first action was brought in Judge Trieber's Court, the Federal District Court sitting at Little Rock. Judge Trieber was, I think, at that time sick and probably was away a good deal of the time. I think that he subsequently dismissed the suit for want of jurisdiction.

Thereafter suit was again filed in the State Chancery Court at ElDorado, and the firm of McNally & Sellers of ElDorado was employed in the suit, which was later removed to the Federal Court and is now the present suit.

I have never had the original stub books showing the sales of units in the Mike Lyvers Syndicate. My information is that they were destroyed while in the Court House in Texarkana. For the purpose of litigation we have a certified copy of the list of unitholders, prepared from the stub book prior to its destruction.

(At this point there was introduced in evidence by agreement the original list of unitholders of the Mike Lyvers Syndicate, as shown by the records of the bankruptcy court in the proceedings of Harry Morris Guaranteed Gusher Syndicate #3, bankrupt. The substance of the list is as follows:)

153 List of Unitholders of Mike Lyvers Syndicate.

Sarah J. Stanfford, 2414 Mitchell Avenue, St. Joseph, Mo.

(The list contains the names of 3312 additional persons, and the post office address of each of them.)

I don't know the exact number of units sold. There was $144,000.00 or $145,000.00 worth, all of the denomination of $10.00 each. I have had in my possession a certified copy of the list of unitholders and have been in correspondence with some of them.

154 Cross-Examination.

I met Mike Lyvers in ElDorado and in Little Rock in 1924 or 1925.

I think the first suit was filed in December, 1925. Prior to the suit I conferred with Mr. Powell, but I cannot say whether Mr. Looney had at that time been employed or not. I think he was employed prior to that time, by Mike Lyvers himself.

Judge Mehaffy never actually went into the case. I think he was appointed to the Supreme Court of Arkansas in January, 1927. Judge Looney, by correspondence and conferences really directed the prosecution of the suit at Little Rock. He was senior counsel, having been employed previous to the others, and if employment prior in time made him the leading counsel, he was such.

FRANK J. LOONEY.

I was associated as counsel in the case which was filed at Little Rock in the U. S. District Court. Mike Lyvers made a contract in October, 1925, with Mr. Powell and his firm and myself to represent him in bringing the suit. Subsequently, Lyvers resigned and appointed Mr. Page who retained us.

Mr. Powell had charge of the filing of the papers in the suit at Little Rock, which were filed in January, 1926, and his firm appeared before Judge Trieber first in connection with the motion which was filed by the defendant attacking the jurisdiction in the case. Powell died in March of that year.

I was at all times one of the counsel in the case and collaborated with all others that were employed. After Judge Mehaffy withdrew from the case, Mr. McHaney was retained. I conferred with him in Little Rock in 1926. He was afterwards appointed on the Supreme bench, and I then went to Little Rock twice to confer with Carmichael & Hendricks.

The motion to dismiss was argued in March or April, 1927, and Judge Trieber decided it immediately after the argument. After Judge Trieber had dismissed the case, McNally & Sellers of ElDorado were associated as counsel. I attempted to get the documents which had been filed with the papers in the suit at Little Rock, but was informed by the clerk of that Court that some of them were missing. The second suit in the State Chancery Court was then filed without these exhibits being attached, and after Judge Martineau was appointed to succeed Judge Trieber, he permitted us to
155 withdraw these exhibits, which were attached to the petition in the first case, and to attach them to the petition in the Chancery Court of Union County.

A delay was occasioned in the bringing of the second suit because Judge Trieber was sick and because we did not appeal from his decision in the case on account of a case that was pending in the Supreme Court of Arkansas involving a similar point. We later decided not to appeal but to file an-

other suit. After Judge Trieber's death there was no Judge in that district and we could not get the exhibits for a while.

The second suit was filed at El Dorado after McNally & Sellers were employed. I think the style of the case for the decision in which we were waiting was Powell vs. Sanders, and the point involved was the validity of service in an action in Arkansas. This case was pending in the Supreme Court of the U. S., and they held that the service was invalid. After I had finally gotten local lawyers in the case at Little Rock, I wrote Mr. Davis in February, 1927, asking him to fix a date for the argument of the motion. Protest was made to Judge Trieber about delay and I have a letter written by Judge Trieber to Carmichael & Hendricks. While Mr. Powell lived there was a division of responsibility. I looked up the law and he attended to court procedure.

Cross-Examination.

During the period that Judge Mehaffy was employed in the case I made no effort to take any action in it. Judge Mehaffy was in the case between terms of the Court and took no action to set the case. Generally speaking, the exhibits to the complaint in this case are the same as the exhibits to the complaint filed at Little Rock. All of the exhibits filed in the case at Little Rock were filed in this case. I think the exhibits had to be certified copies. I don't know that a stenographer's copy would be sufficient. I made no effort to have the exhibits in the first case copied in order that I could use them in the second. I waited until Judge Martineau was appointed to succeed Judge Trieber and asked him for them.

On March 4, 1927, Judge Trieber wrote to Mr. J. H. Carmichael of Little Rock a letter relative to the hearing of the motion to quash in the case pending before him, a copy of which Mr. Carmichael forwarded immediately to me. The said letter being as follows:

156 "D. X. 1.

United States District Judge's Chambers
P. O. Box 676

Jacob Trieber,
District Judge

March 4, 1927.

Mr. J. H. Carmichael,
City.

Dear Sir:

I am in receipt of a letter from Mr. Frank J. Looney, of Shreveport, La., with an enclosed letter from you in relation

to the disposition of a motion in Page, Trustee, v. Natural Gas & Fuel Corporation.

As you are aware motions in this court can be called up any time after notice to opposing counsel. The fact that opposing counsel doesn't want to take it up doesn't prevent a hearing.

As the court here is in session all the time you can inform Mr. Looney that upon notice to the attorney of record, that he will call the motion up on a certain day, it will be heard.

I don't know the counsel who don't reside in this state have designated an attorney enrolled in this court as the person upon whom service of orders or notices may be had, as required by the rules of this court. If it has not been done notify Mr. Looney and he can notify the other attorney to give it immediate attention.

Yours truly,

(Signed) JACOB TRIEBER,
U. S. District Judge.

P. S. You notify Mr. Looney of the contents of this letter."

I don't mean to leave the impression that Judge Trieber was delayed in making his decision on the motion because of any case that was pending before the Supreme Court of the U. S.

(The above testimony concluded plaintiff's oral testimony in chief. At this point plaintiff introduced in evidence the originals of the following exhibits to the complaint:)

157 1. Original declaration of trust of the Mike Lyvers Syndicate, which is Exhibit A to the complaint.

2. The original substitution by Lyvers of Page as Trustee, plaintiff's exhibit No. 3. The document is as follows:

"Appointment of Trustee in Succession.

Whereas, by a certain declaration of trust, now of record in Union County, Arkansas, in Record Book 151, page 460, the undersigned declared a trust in himself as trustee for Mike Lyvers Guaranteed Gusher Syndicate; and,

Whereas, by a certain Declaration of Trust, now of record in Union County, Arkansas, in Record Book 157, page 235,

the undersigned declared a trust in himself as trustee for the Mike Lyvers Syndicate; and,

Whereas, by a certain declaration of trust now of record in Union County, Arkansas, in the record Book ....., Page ....., the undersigned declared a trust in himself as Mike Lyvers, Trustee; and,

Whereas, by the terms of said Declarations of Trust it is provided that the undersigned as trustee thereof may resign as trustee and substitute in his stead any other proper and trustworthy person, to act for and in his behalf as substituted trustee under said Declarations of Trust,

Now, Therefore, I, Mike Lyvers, do hereby resign as trustee of Mike Lyvers Guaranteed Gusher Syndicate, and Mike Lyvers as trustee for Mike Lyvers Syndicate and Mike Lyvers, Trustee, and do hereby constitute and appoint as my trustee in succession to each of said trusts, John H. Page, of Pulaski County, Arkansas, who is clothed by virtue of the appointment and the provisions of said respective declarations of trust, with all power, authority and discretion respecting said trust estates and property owned by them, that heretofore has been possessed and exercised by me, as trustee for them and each of them.

In Witness Whereof, This instrument is signed this the 20th day of October, 1925.

MIKE LYVERS Trustee,

MIKE LYVERS SYNDICATE,
By Mike Lyvers, Trustee,

GUARANTEED GUSHER SYNDICATE,
By Mike Lyvers, Trustee.

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158 3. Plaintiff's exhibit No. 4, oil and gas lease from J. A. Bilyou and M. D. Bilyou, his wife, to J. W. Olvey, covering Northwest Quarter of Northwest Quarter of Section 9, Twp. 16 South, R. 15 West, Union County, Arkansas. This is an oil and gas lease in customary form. It provides that it should extend for a period of five years from May 19, 1922, and as long thereafter as oil or gas is produced from said land by the lessee. The lease provides for a royalty of 1/8th of the oil, two hundred dollars per well per year for dry gas, and one hundred dollars per well per year for casing-head gas, and contains a provision that

unless a well is commenced on the land on or before May 19, 1923, the lease shall terminate, unless the lessee on or before that date shall pay to the lessor or deposit to his credit in the First National Bank of El Dorado, Ark. the sum of $40.00 which shall operate as a rental covering the privilege of deferring the commencement of a well for twelve months from said date. In like manner, and upon like payments or tenders the commencement of a well may be further deferred for like periods for the same number of months successively.

4. Assignment of oil and gas lease from J. A. Bilyou and wife to John W. Olvey, covering the Northwest Quarter of the Northwest Quarter of Section 9, Twp. 16 South, Range 15 West, executed by J. W. Olvey assignor, to C. H. Murphy, assignee, under date Oct. 23, 1922,—plaintiff's exhibit No. 5.

5. Plaintiff's exhibit No. 6, assignment of oil and gas lease from J. A. Bilyou to John W. Olvey covering the Northwest Quarter of the Northwest Quarter, Section 9, Twp. 16 South, R. 15 West, Union County, Ark. executed by C. H. Murphy, assignor, to Otto L. Morris, assignee, under date of April 4, 1923. This assignment is in customary form, but contains the following additional provision: "The said Otto L. Morris as further consideration for this conveyance does hereby bind and obligate himself, his successors, heirs and assigns, to deliver to the said C. H. Murphy, or his assigns, out of a full 7/16ths of all the first oil and gas produced and saved from the above described premises, the sum of $32,000.00. All division orders for said interest to be signed by said C. H. Murphy and his assigns, and payments for said interest to be made direct by purchasers to the said
159 C. H. Murphy, or assigns.

6. Assignment from Otto L. Morris to Mike Lyvers, Trustee, to the East half of the NW¼ of the NW¼ of Section 9 (20 acres), and also certified copy of assignment of Otto L. Morris to Mike Lyvers Syndicate of the West half, or other 20 acres of the lease, being plaintiff's exhibits Nos. 7 and 8 respectively, correct copies of which are plaintiff exhibits B & C to his complaint.

7. The intervention of Mike Lyvers before the Referee in Bankruptcy, which was plaintiff's exhibit No. 9, a correct copy of which is plaintiff's exhibit D to his complaint.

8. Certified copy of the order of the Referee denying the aforesaid intervention of Mike Lyvers, which is plaintiff's exhibit No. 10, a correct copy of which is plaintiff's exhibit E to his complaint.

9. Copies of the petition for review of the order of the Referee denying the aforesaid intervention of Mike Lyvers, and of the order of the District Court denying the petition for review of the aforesaid order, which are plaintiff's exhibits 11 and 12. Correct copies of said exhibits are together made exhibit F to plaintiff's complaint.

10. Copy of the quit claim deed of October 13, 1924, from Mike Lyvers Syndicate, Mike Lyvers Trustee, to H. M. Barney, Trustee in Bankruptcy, and copy of the deed of March 2, 1925, from H. M. Barney, Trustee in Bankruptcy, to Natural Gas & Petroleum Corporation. These documents were introduced in evidence as plaintiff's exhibits 13 and 13A respectively; and correct copies thereof were made exhibits G & H to plaintiff's complaint, and appear in this record.

11. Plaintiff's exhibit No. 14, assignment of oil and gas lease from Mike Lyvers to H. L. Williford, executed September 6, 1923, assigning the oil and gas lease known as the Mullins lease, covering a portion of South half of the Southwest quarter of Northwest quarter of Section 27, Twp. 15 South, R. 16 West, Union County, Arkansas.

12. Plaintiff's exhibit No. 15, quit claim deed from H. L. Williford as receiver, to H. M. Barney, Trustee in Bankruptcy of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, executed February 22, 1924, conveying all of his interest in any property whatso-
160 ever as receiver appointed by the Chancery Court of Union County, Arkansas, which assignment particularly describes the Mullins lease covered by the assignment from Mike Lyvers to H. L. Williford as receiver, described in the paragraph immediately preceding which is paragraph 11.

13. Plaintiff's exhibit No. 16, certified copy of indictment by the United States of America vs. Harold I. (Mike) Lyvers, No. 1897 in the United States District Court for the Western District of Arkansas, Texarkana Division, filed December 12, 1923. The substance of this indictment is as follows:

"That heretofore, and prior to the several acts of using the United States Mails, hereinafter set forth, one Harold I. Lyvers, otherwise called "Mike Lyvers", Harry N. Morris, Otto L. Morris, Hy Garland, L. R. Rowland, and Sam Goldblatt, (whose true first or Christian names are to the Grand Jurors unknown, except as herein stated), all hereinafter in this indictment called defendants, had devised and intended to devise a scheme to obtain money and property by means

of false and fraudulent pretenses, representations and promises from numerous and sundry persons, too numerous to mention herein, and including the public generally, and including those whom, by the means hereinafter described, were induced to give, sell and pay their money and property to the said defendants, and the said companies, trust estates and syndicates hereinafter named, for what is hereinafter styled units or certificates of interest in the following companies, trust estates and syndicates; Camden Oil Land Owners Association, Mike Lyvers, Trustee, and Mike Lyvers Syndicate, (all of said persons being hereinafter referred to as the persons to be defrauded), the said scheme being in substance and effect as follows, to-wit:

That the said defendants would organize and promote three certain oil stock promotion companies, trust estates and syndicates and sell the units or certificates of interest thereof, and said defendants would dominate and control said companies, trust estates, and syndicates regardless of the interests of the unitholders or share-holders, said companies being as follows, to-wit: Camden Oil Land Owners Association, organized as a trust estate under the laws of the
161 State of Arkansas, with the defendant, Harry I. Lyvers, otherwise called "Mike" Lyvers, as agent, units or certificates of interest of the par value of $10.00 each, with capitalization unlimited and declaration of trust being recorded in Ouachita County, Arkansas, on ..... day of July, 1922; Mike Lyvers, Trustee, organized as a trust estate under the laws of the State of Arkansas, with the defendant Harold I. Lyvers, under the name of Mike Lyvers, as sole trustee, with units or certificates of interest of the par value of $10.00 each, with capitalization unlimited, declaration of trust being recorded in Union County, Arkansas, on January 12, 1923, and Mike Lyvers Syndicate, organized as a trust under the laws of the State of Arkansas, with the defendant, Harold I. Lyvers, under the name of "Mike" Lyvers, as sole trustee, with units or certificates of interest of the par value of $10.00 each, with capitalization unlimited, declaration of trust being recorded in Union County, Arkansas, on February 22, 1923, (all of which are hereinafter designated and called 'Companies').

It was further a part of said scheme that the said defendants would and did induce said persons to be defrauded to subscribe for and pay for a number of said units or certificates of interest in said companies, and that said subscription contracts or information concerning said subscriptions would be and was transmitted to the said "Mike"

Lyvers and the said companies at El Dorado, Arkansas, and that in the due course of business said units or certificates of interest in said companies would be and were transmitted through the United States Mails from El Dorado, Arkansas, to said persons to be defrauded, and other documents and literature would be and were transmitted therewith at said time, all of which the said defendants then and there well knew and intended.

7. To the effect that on February 17, 1923, the said defendants represented that another gusher was absolutely guaranteed in the Mike Lyvers Syndicate or money would be paid back; that the said defendant, Lyvers, would do most of the drilling of this well with his own toil-worn hands and that it would be drilled right; that when he paid off he would set a record that others would shoot at for years in
162 vain; that he, the defendant, Lyvers, would do nothing in the course of his said promotion campaign that would act as a teaser to induce people to buy units in said syndicates; that back of him was a record of successful oil operations and a record that is unparalleled for honesty and for keeping his word; that he was not luring said persons to be defrauded, into something that looked like one thing and was really another; when in truth and in fact as the said defendants then and there well knew that said guarantee of a gusher was not founded on truth or fact and that it was not true that the said defendant Lyvers would do the drilling of said well with his own hands and that it was not true that his record would or did set a record for others to shoot at and that it was not true that he would do nothing while promoting said syndicate which would induce people to buy units, and that it was not true that he had a record that was unparalleled for honesty or for keeping his word or that he would not lure them into something which was not as represented, but in truth and in fact each and every of said pretenses was only the lure and bait of a highpowered oil stock-promoter and was made by the said defendants, and each of them, to induce said persons to be defrauded to part with their money and property by paying same over to said defendants in their said fraudulent enterprise:

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made and planned to be made by said defendants to effect said scheme were false and untrue and at all times mentioned herein were known by the defendants, and each of them, to be false and untrue, and to be made by the said de-

fendants with the purpose and intent of inducing the said persons to be defrauded to pay them, the said defendants, as aforesaid, large sums of money and property for shares or certificates of interest of the said companies, all of which the defendants then and there well knew."

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163 Defendant's Testimony.

JESS RIGGS.

I worked for Harry Morris from late spring of 1922 until the middle of the summer 1923. I quit working for him about three weeks before his properties were put into State receivership in the Union Chancery Court. I worked for Morris as General Drilling and Production Superintendent, and was operating properties for the Morris Drilling Company, the Harry Morris Guaranteed Gusher Syndicate No. 3, and Mike Lyvers Syndicate. The property consisted of producing leases and leases that were being developed by the drilling of wells. I had charge of the operation of the properties and of purchasing the material and supplies for the various leases. I bought the material and supplies that were used on the Mike Lyvers Syndicate leases. These supplies were bought in the name of Harry Morris Guaranteed Gusher Syndicate No. 3. For several months prior to the time the Morris properties went into receivership we had a field office at Smackover where we received the invoices for material, and my men and I received the supplies as they were delivered.

In the ordinary course of business a part of the checks that were issued in payment of these accounts were issued in my office. I approved the bills for materials, labor and supplies before they were paid. We had no account at the supply house in the name of Mike Lyvers. The stuff was all charged either to the Morris Drilling Company or Morris Guaranteed Gusher Syndicate No. [2.]

There were numerous laborers employed on these leases, including the leases of the Mike Lyvers Syndicate. I had charge of paying the men, all of whom were paid by check. None of them were paid by check of the Mike Lyvers Syndicate. Most of them were paid by Guaranteed Gusher Syndicate No. 3 or by the Morris Drilling Company.

I drilled at least two wells on the Johnette lease, which belonged to the Mike Lyvers Syndicate. It might have been

three. Those wells were drilled to the Nachitoches sand, which is the first sand around 2000 feet. We had to put in a Standard rig, pumping equipment, and a gas engine and tubing in order to make these wells produce. The cost of drilling was about $12,000.00 per well. In addition, it cost from $12,000.00 to $15,000.00 to equip the two wells with tanks and other articles necessary to place on the ground for their production. The Mike Lyvers Johnette lease consisted of a part of a ten acre strip,—seven and a half acres.

164 The Guaranteed Gusher Syndicate No. 3 had a lease adjoining it, and so did the Morris Drilling Company. We operated those three leases as a unit, and there were about six men engaged in the operation continuously. These men were paid by the Guaranteed Gusher Syndicate No. 3 and Morris Drilling Company. Otto L. Morris was the chief executive of the Guaranteed Gusher Syndicate No. 3 and of the Morris Drilling Company, and was the only man that gave me any orders. David Morris had charge of the business in the ElDorado office, and I understood that Harry Morris was the head of all of it; but he did not take any active part in field operations. He was the Trustee of the Morris Guaranteed Gusher Syndicate No. 3. Otto Morris gave me my orders relative to the work for the Mike Lyvers Syndicate. He was the immediate employer that I knew over the whole thing. There was a man by the name of Copeland who kept the books for these organizations. He was located in the office of the Morris Drilling Company, over the Post Office Building, in ElDorado, which was the main office. The office of Harry Morris, Trustee for the Morris Guaranteed Gusher Syndicate No. 3 and the office of Mike Lyvers Syndicate was all in the same room with the Morris Drilling Company, and the same office force in the same office attended to the affairs of the Mike Lyvers Syndicate as attended to the affairs of the other organizations. I knew Mike Lyvers at the time I was working for these organizations and saw him from time to time. He had just been going to school and I judged him to be around twenty-one or twenty-two years old. When I first met him he was helping on a drilling rig on a wild cat well South of ElDorado which was being drilled by the Morris Drilling Company. He was an employee working by the day, and this was in the early part of 1922. After the organization of the Mike Lyvers Syndicate I never received any orders from Mike Lyvers regarding the drilling or operation of property standing in the name of the Lyvers Syndicate. Lyvers did nothing in connection with it so far as the field

was concerned. About all I ever saw him do was to hang around the office here in ElDorado with Otto Morris. Occasionally he did come up to the field with Otto and ride around, and sometimes he came and escorted unitholders around. At times Otto Morris would ask me to take Lyvers out there and get him out of the office. I do not recall any instance of Mike Lyvers ever being in the office while Otto Morris was telling me what to do relative to the Lyvers property. Some time during the early part of 1923 some Mike Lyvers unitholders
came to Smackover to look at the property of the Mike
165 Lyvers Syndicate. They wanted to look over the
property that they had bought stock in. At that time we did not have any property in the name of the Mike Lyvers Syndicate to show them. Later on there was some property in the name of the Lyvers Syndicate. My salary for the work that I did relative to these properties was paid by the Harry Morris Guaranteed Gusher Syndicate No. 3 and the Morris Drilling Company. The Mike Lyvers Syndicate never paid me anything.

A. C. Babb.

I am Vice-President and Cashier of the National Bank of Commerce, ElDorado. I was Vice-President of the bank in 1923. During that year an account was opened with our bank in the name of Mike Lyvers Syndicate. The account was opened on February 23, 1922. I have the signature cards relative to the account. I also have with me a power of attorney signed by Mike Lyvers, as Trustee, authorizing D. A. Morris to transact business. I found it with the records of the account. (The power of attorney was here introduced in evidence as defendant's exhibit No. 3, and the material part is as follows:)

"Know All Men By These Presents: That I, Mike Lyvers, of said county and state, have made, constituted and appointed, and by these presents to make, constitute and appoint D. A. Morris, of El Dorado, Arkansas, my true and lawful attorney, for me and in my name, place and stead to sign checks, vouchers, receipts, documents, and any and all papers of every kind, and to execute contracts, bills of sale, deeds, mortgages, pledges and all other forms of documents, bargaining, granting, selling, delivering, alienating, disposing of, incumbrancing, any and all real or personal property which is now owned in Union County, Arkansas, by the said Mike Lyvers, or any and all real or personal property which the

said Mike Lyvers, may acquire in Union County, Arkansas, and to do and perform any act of any nature which the said Mike Lyvers could perform, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming whatsoever my said attorney shall and may do by virtue hereof in the premises.

This power of attorney also delegates full authority to D. A. Morris to act for me in all syndicates in which I am trustee, giving special authority to sign checks, vouchers, receipts, certificates and other legal documents connected with the said syndicates, and to do and perform all the acts of trustee for and in my place.

This is a full and complete power of attorney without limitations or restrictions as to any particular property or as to any particular sum of money involved, but is limited to Trust Estates of which Mike Lyvers is trustee, and is limited to real and personal property and business matters located in Union County, Arkansas.

In Witness Whereof, I have hereunto set my hand, this the 4th day of January, 1923."

166 Witness also introduced in evidence the following:

Defendant's exhibit No. 4, signature card of the National Bank of Commerce of El Dorado, Ark. recording the signature of D. A. Morris as a person authorized to draw checks on the account of Mike Lyvers Syndicate, dated February 23, 1923.

Defendant's exhibit No. 5, a letter from Mike Lyvers to National Bank of Commerce of El Dorado, Ark., authorizing D. A. Morris to sign checks and drafts on the account of Mike Lyvers Syndicate, dated February 23, 1923.

Defendant's exhibit No. 6, signature card of the National Bank of Commerce of El Dorado, Ark. recording the authority of Otto L. Morris to draw checks upon the account of Mike Lyvers Syndicate with that bank, dated March 2, 1923.

Defendant's exhibit No. 7 letter from Mike Lyvers addressed to National Bank of Commerce, El Dorado, Ark., instructing said bank to honor any check that Otto L. Morris might draw on the account of Mike Lyvers Syndicate, dated March 16, 1923.

Defendant's exhibit No. 8, signature card of National Bank of Commerce of El Dorado, Ark. dated October 8, 1923, recording the authority of Mike Lyvers to draw checks on the account of Mike Lyvers Syndicate with said bank.

The card of October 8, 1923, was the first signature card signed by Lyvers that the bank had. We would have paid a check on the Mike Lyvers Syndicate account signed by Mike Lyvers before the signature card of Mike Lyvers was filed.

(Here the ledger sheets showing the Mike Lyvers Syndicate account were introduced in evidence. This ledger sheet shows deposits in and withdrawals from said account on various dates between February 23, 1923, and August 17, 1923, total deposits being $132,139.11 and total checks drawn $132,-137.22.)

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167 D. G. NATIONS.

In the fall of 1922 and the first half of 1923 I was Assistant Production Foreman and assistant to Jesse Riggs for Morris Drilling Company and Harry Morris Guaranteed Gusher Syndicate No. 3, and as such I had an office at the warehouse of Harry Morris Guaranteed Gusher Syndicate No. 3 at Smackover. I had charge of buying, under Mr. Riggs, the material for the leases, and OKing the charges. I also was Production Foreman for the Morris properties. So far as I know, the Morris Drilling Company and Guaranteed Gusher Syndicate No. 3 paid for the material and supplies that were bought and used on all those leases. We had orders to charge them to the Morris Drilling Company. The material for drilling rigs was charged to the Morris Drilling Company, and the material for the leases was charged to Guaranteed Gusher Syndicate No. 3. We were required to OK all bills that came in. Most of the bills were charged to Morris Guaranteed Gusher Syndicate No. 3. However, we made the checks out in the field. The bookkeeper would make out checks for the men, and we would take them in and get them signed. We never, to my knowledge, charged anything to Mike Lyvers Syndicate, and I know of no property that that Syndicate owned in the field. If I worked on any Mike Lyvers properties, I did not know them as such. Mike Lyers never gave me any orders in relation to any of these properties. I knew Lyvers at the time. He told me that he was going to school in the fall of 1920. He told me that Otto Morris paid him $150.00 a month to go to Centenary College and play foot ball. He came back after the foot ball season was over. I

saw him around the office and in the field after that. He drove Otto a while and was his social companion. He drove the Morrises up into the field, and probably ran errands for them. Mr. Riggs sent him out to work for me once or twice. I ran him off.

ELIA M. DUMIS.

I am a public stenographer. I took and transcribed the testimony generally that was taken in the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, bankrupt, at Texarkana some years ago. The paper that you have handed me is the testimony taken at a hearing on the salary claim of Mike Lyvers filed with the Referee in the bankruptcy proceeding. I took these questions and answers down in shorthand and transcribed them, and this is a correct transcription of the testimony. (The transcript of the testimony of
168 Lyvers was thereupon introduced as defendant's exhibit No. 11 and read in evidence. The material portions thereof are as follows:

"Q. How long did you work for the Harry Morris Guaranteed Gusher Syndicate No. 3?

A. Well, I worked for Harry Morris ever since May, 1922.

* * * * * * *

Q. But you did not receive your salary for May, June, July and August, 1923? A. No, sir.

Q. Why?

A. Well, the money that they had in the treasury they used it to pay off the small labor claims, and I being so close to Harry and Otto, why they could owe me, but the others they could not.

* * * * * * *

Q. What was your position with the Mike Lyvers Syndicate, if any?

A. Well, the organization, as a whole, was one organization; and the orders that I carried out was for everything, not only the Harry Morris Guaranteed Gusher Syndicate No. 3.

Q. The Mike Lyvers Syndicate is shown to be in charge of Mike Lyvers, Trustee; are you the Mike Lyvers mentioned as Trustee of the Mike Lyvers Syndicate.

A. Yes, sir, Trustee in name only.

Q. Trustee in name only? A. Yes, sir.

Q. Who handled the business?

A. Harry Morris handled the business.

Q. Then the Mike Lyvers Syndicate, Harry Morris Guaranteed Gusher Syndicate No. 3, and the various other syndicates were, as a whole, just one organization?

A. Yes, sir.

Q. And you received your salary from the Harry Morris Guaranteed Gusher Syndicate No. 3?

A. Well, some times I would get a check from the Harry Morris Guaranteed Gusher Syndicate No. 3, and then some times I would get a check from the Morris Drilling Company.

Q. Then Mr. Lyvers, you did not get your checks from one particular organization?

A. Well, they were all really one and the same thing. They were just separate organizations, but run on the same basis.

Q. And all controlled by the Morrises? A. Yes, sir.

* * * * * *

Q. I notice in the Declaration of Trust for the Mike Lyvers Syndicate that the Trustee would get one-fourth of the profits, if any; would you really get that, or would that go to the Morrisses?

A. That would go to the Morrises. My signature was not even good at the bank.

Q. Then, Mr. Lyvers, the one-fourth of the profits, as shown in the Declaration of Trust, would really not go to you?

A. It would revert to the Morrises, if anybody.

Q. You mean Harry and Otto Morris? A. Yes, sir.

Q. Had you at the beginning, or have you now, any interest, directly or indirectly, in the property belonging to the Mike Lyvers Syndicate?

A. Well, my interest,—the property is in my name right now.

Q. That property is really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3? A. Yes, sir."

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169 H. L. WILLIFORD

On or about August 28, 1923, I was appointed Receiver by the Union Chancery Court for the property of Harry Morris Guaranteed Gusher Syndicate No. 3.

As Receiver I had in my charge all of the properties of the Guaranteed Gusher Syndicate No. 3, of the Morris Drilling Company, and all of the Mike Lyvers Syndicate properties. Shortly after I had been appointed Receiver, I took charge

of the properties and found that they were operating two leases, the Johnette and the Mullins leases, and that the Mike Lyvers Syndicate had an interest in part of it and was operating it jointly. Lyvers called in to see me. I had been trying to get all of the assets in and had inquired for the books of the companies, but the books had been taken away. We did not have many invoices to act on and had to make a complete inventory. Lyvers came in and seemed more worried about keeping out of the penitentiary than anything else, and asked if I could protect him. I told him I would like to get all the money I could for the stockholders, and would not try to make it hard on him. He said he would turn over everything he had, that he was only working for the Morris boys, and he did sign one paper conveying certain property. The paper I refer to is a quitclaim deed conveying the Mullins lease. I could never locate him afterwards, although he had promised to convey everything.

S. W. L. Backus.

I am the Manager of the Oil Well Supply Company at Shreveport. During the years 1922 and 1923 the Oil Well Supply Company sold material to Harry Morris, as Trustee for the Harry Morris Guaranteed Gusher Syndicate No. 3.

I have with me a statement of what was owing at the time the Morrises got into financial trouble. At that time the Guaranteed Gusher Syndicate No. 3 was indebted to the Oil Well Supply Company for supplies to the leases of the various companies. Some of these materials had been fur-
170 nished to the Mullins lease. They owed us, for material furnished the Mullins lease, $369.62. We were paid all of that money by the Trustee in Bankruptcy, Mr. Barney.

H. M. Barney.

About November 23, 1923, I was appointed by the U. S. District Court Receiver in Bankruptcy of the Harry Morris Gusher Syndicate No. 3, and was elected Trustee in Bankruptcy in January, 1924. When I was appointed Receiver I came to ElDorado and demanded that Mr. Williford, the State Receiver, deliver me the properties of the bankrupt. He refused, and subsequently Judge Faris issued an order directing me to take the properties over. I then returned to ElDorado and Mr. Williford turned over to me all the properties that he had in charge as Receiver.

Mr. Williford turned over to me the office of the Harry Morris interests in the Post Office Building at ElDorado, and instructed his men to turn over to me all the properties in the field, North and South field. There were very few records in the office. They turned over to me abstracts, and receipts for abstracts where they were in the hands of abstractors, and some books, the keys to the safe, the lease records giving the history of the leases, and the maps showing the location of the properties. There were no books of account there. Mr. Williford advised me he had never had possession of them, that they had been removed before he took possession. I went to Shreveport and was informed that the books were in the hands of Mr. Wilkerson at Shreveport. I made a report to Judge Pope, the Referee, and a meeting was held at Shreveport with Judge Grimmet. Witnesses were subpoenaed with reference to the books, but we were unable to locate them, and never found them. I found no books of the Mike Lyvers Syndicate nor of the Morris Drilling Company. There were some records but no books of account. After I had obtained possession of the records, I went out into the field with Luke Brandon, who was thoroughly familiar with the field and whom I had employed, and I begun taking the properties into possession. I did this by posting every property that appeared on the maps in the office and in the lease records. I had a large supply of placards, stating that this property was in the custody of the District Court of the U. S. for the Western District of Arkansas, Texarkana Division, and my name was placed on each placard, as Receiver in Bankruptcy of the Guaranteed Gusher Syndicate No. 3. We visited all of the properties and
put up the signs on each property. Where there were
171 derricks we attached the signs to the derricks; where the property was vacant, to the trees. I had an inventory of all of the leases and a map that I had obtained in the Morris office.

Q. I believe you said you went on the Bilyou lease?

A. I went on to what was pointed out to me as the Bilyou lease.

Q. And you located it from the map?

A. Yes; the reason I remember it was there was a Bradford & Saxon property that evidently [—] similar properties. I think there had been a fire on one of those leases, those were the last leases. From there we went to the Falcon lease further east, as I had the direction, to the Bilyou lease. That was what they called the crater territory."

172 The above transactions took place in November, 1923, and I operated the Mullins and Johnette leases until

I sold them in 1925 to Col. Barton who at that time was with the Natural Gas & Petroleum Company. Negotiations began with him about Christmas of 1924. I took over all the properties, reduced them to possession and operated and preserved them. I investigated every claim that was filed with the Referee in Bankruptcy, and filed exceptions to many of them. There were several hundred claims, aggregating $200,000 or $300,000. There was something over $600,000 handled in the estate, and practically all of it went to pay debts and operating expenses. There were numerous claims, representing debts for material and supplies, that went into the operation of the Mullins and Johnette leases of the Mike Lyvers Syndicate. When I took over the properties, the Johnette lease was a pumping lease, having three wells, I think, operating on it. The oil was being pumped and run into tanks and settled out and run to the pipe lines, and I collected the money for them. All of the wells on the Johnette lease were being operated by the same men as one operation. It was being operated along with all the properties in the North field—about twenty-eight or twenty-nine wells. The Mullins lease was being operated along with it.

"Q. But the fact that the leases stood in the name of the Mike Lyvers Syndicate had not come to your attention at that time?

A. Possibly had. I was checking up titles all the time. I did not take it seriously."

While I was Trustee in Bankruptcy, Mike Lyvers came to me several times at Texarkana and discussed the matter with me. He told me that he had no interest in these properties at all, that he was simply an employee of the Morrises, and that the properties belonged to the Morris interests. In going through the leases, I found that the title to the Bilyou lease, Mullins lease, and a portion of the Johnette lease stood in the name of Mike Lyvers. Some of the leases stood in the name of Otto Morris, some in the name of Morris Drilling Company, and some in the name of Guaranteed Gusher Syndicate No. 3. Some of the South field leases were in the Harry Morris Syndicate, and I made an effort to get those titles straightened up. Shortly after, a firm of attorneys of Ft. Worth, Texas, filed an intervention in the bank-
173 ruptcy proceeding in the name of Mike Lyvers, and after that I talked to Mike Lyvers about his ownership of this property and he disclaimed any ownership. His intervention was denied, and he was presenting his claim for salary only, and that was ultimately paid. I later obtained a quitclaim deed from Mike Lyvers to me as Trustee in Bank-

ruptcy. A quitclaim deed was delivered to me by Lyvers of all the properties I took in possession as Trustee in Bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3. I have in my hand a correct copy of the deed. The deed was obtained in Texarkana. While I was in my office during October, 1923, he talked to me about the execution of the quitclaim deed to the property standing in his name, and which I had in charge at the time as Trustee in Bankruptcy. The deed was prepared in my office and submitted to me and executed there. He made no objection whatever to executing the deed, nor did I make any threats. He came to my office of his own volition and was anxious to collect his money in the Bankruptcy Court and get through with it. I do not recall whether he had been sentenced at that time, but think he was figuring on serving his sentence in jail at Shreveport. He was anxious to get the money that was coming to him as wages.

I eventually entered into a contract to sell the remainder of the properties in my hands to the Natural Gas & Fuel Company. The contract which is here exhibited to me is the contract that I refer to, and it recites a down payment by the purchaser of $25,000.00, the proposed full consideration being recited as $125,000.00.

(The contract, bearing date of February 23, 1925, was here introduced in evidence. The substance is as follows:)

H. M. Barney, Trustee for Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris, Trustee, and Harry N. Morris, Bankrupts, Estates Nos. 674 and 677 in Bankruptcy, agreed to sell to the Natural Gas & Petroleum Corporation, and the Natural Gas & Petroleum Corporation agreed to buy from him all of his interest in oil and gas leases or any minerals upon fifty-nine separate tracts of land in Union and Ouachita Counties, Arkansas. Under the terms of the contract the purchaser paid $25,000.00 down at the execution of the contract, and was to pay an additional $100,000.00 on titles to the properties which were producing oil or gas being approved as marketable, it being provided
174 however that if the title to any of the non-producing properties was found to be not marketable a deduction equivalent to the value of each parcel of said rejected property, if any, from the purchase price was to be made, the amount of the deduction to be ascertained by arbitration as provided in the contract. The buyer was given

thirty days in which to examine title to the various properties, with the customary provisions as to the curative work being done by the seller. The contract provided that from the date of its execution to its consummation the producing properties should be operated jointly by the buyer and the seller, and in the event of the consummation of the contract the buyer should be entitled to the net proceeds of the joint operation, provided that if there was no net proceeds the seller should be reimbursed for any loss from operations during the period. This contract particularly described the J. A. Bilyou lease covering the NW¼ of the NW¼ of Section 9, Twp. 16 South, R. 15 West, Union County, Arkansas. This contract was acknowledged and recorded on January 27, 1925, at 10:30 A. M. in the deed records of Union County, Arkansas, Deed Record Book 199, P. 451.

175 I operated these properties from November, 1923, continuously until I sold them, and I became familiar with the values of oil and gas leases in the North field at ElDorado, commonly called the Smackover field. I was negotiating, along in 1924 and 1925, constantly for the sale of the property, keeping up with other sales and trying to effect sales to the best advantage. In my opinion, on the date I entered into the contract with the Natural Gas & Petroleum Corporation, the Bilyou lease had no commercial value. It could not be sold, because it had a $32,000.00 oil payment on it, payable out of the first 7/16 of oil when it was produced from the lease. I had made efforts to sell it. I had negotiated with hundreds of people for the sale of these properties, individual properties and in bulk. I had attempted to sell the Bilyou lease to dealers or to any purchaser I could find, and was unable to find a purchaser. I had had this experience with oil payments, and had effected a reduction of some oil payments on the property in order to sell them. The Bilyou lease had a $32,000.00 oil payment on it owing to C. H. Murphy, Trustee. Murphy was the President of the First National Bank at ElDorado. I talked to him about reducing this oil payment, and he declined to do it. He asked me if I was going to trade the property and I told him that I couldn't. He then said that there was no use in selling his oil property. We negotiated for weeks, and he finally offered me $1,000.00 for the lease in order to get development on it. I conferred with the Referee, and had been authorized to accept $1,000.00 for it. I was not able to sell it to any one else. It was in what is known as the "Crater area" and had no value at that time. Previously a well had been drilled near the Bilyou lease, and had blown up and created a crater;

and though it was possible to develop that territory as oil or gas producing property, yet on account of the tremendous gas pressure in a crater of the earth when they drilled, it was not considered practical. There was a wide strip of country in there several miles long and probably two or three miles wide on which there was no development at that time.

176 There had been no wells drilled on the Bilyou lease up to that time, and the nearest production as I can recall it was on the Flenniken lease, a long way from it. The Bilyou lease provides for an annual rental of $40.00, to be paid to the lessor or deposited to his account in the First National Bank of ElDorado on or before May 19 of each year, and I, as Trustee of the bankrupt estate, paid this annual rental for the year 1924, by depositing $40.00 in the bank. I did this in order to preserve it as an asset for the estate.

During the time from the execution of the contract with the Natural Gas & Petroleum Company to the date of the delivery of the deed to it I regarded the operation of the properties sold them as a joint operation. They were privileged to [—] on the property and assist in the operation of it. I retained control until the matter was concluded. They did enter on the properties and assisted in the operation of them, and among those properties was the Mullins Lease and the Johnette lease.

I testified yesterday that all of the claims of the commercial creditors in the bankruptcy matter were paid in full.

(At this time the following stipulation was incorporated on the record by consent of counsel.

Stipulation.

It is agreed that in the bankruptcy matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry Morris Trustee, and Harry N. Morris, Nos. 674 and 677, in the United States District Court for the Western District of Arkansas, Texarkana Division, 541 persons who owned certificates of beneficial ownership in the trust estate designated Mike Lyvers Syndicate, filed claims as deferred creditors; that attached to the claim of each person were the certificates of beneficial ownership in Mike Lyvers Syndicate, which was or were the basis of the claim of each person, and that the total number of certificates of beneficial ownership in said syndicate so filed with the claims was 10827½ units of the face value of ten dollars each. It is further agreed that each of these claims was allowed by the Referee and dividend was paid to

each of the claimants the said dividend being one-fourth of one per cent of the face value of the claims on these units. It is further agreed that all of said claims were filed in said matter prior to January 1, 1925.

It is further agreed by counsel for plaintiff and counsel for the defendant, that each may file not exceeding five of the claims referred to in the agreement.)

Thereupon counsel for defendant introduced in evidence five claims filed by Mike Lyvers Syndicate unitholders in the bankruptcy proceeding, and counsel for the plaintiff introduced in evidence five claims filed by Mike Lyvers Syndicate unitholders in the bankruptcy proceeding.

177 These claims were filed on printed forms, there being attached to each of the claims the certificates of beneficial interest in the Mike Lyvers Syndicate held and owned by the claimant, the claim being in an amount equivalent to the number of units held in the Syndicate on the basis of ten dollars per unit. The claims were in the ordinary unsecured form of bankruptcy claim, some of them being coupled with a power of attorney to A. D. Keaney. Attorney at Law, authorizing him to represent and vote for the claimant in any proceedings or meetings that might be called in the bankruptcy proceeding in court or otherwise, to vote for the claimant in the choice of a trustee, to accept or oppose any composition offered in the proceeding, and to receive and receipt for all moneys which might become payable to the claimant in the bankruptcy proceeding. The attorney is also authorized in the event of a reorganization of the Syndicate to accept stock in the reorganized Company in the name of the claimant, and in lieu of units held by the claimant in the Syndicate, in conformity with a certain plan of reorganization adopted by the Committee of unitholders composed of Anthony Doll, W. B. Cauble and William McComb.

All of the claims introduced under the above stipulation by counsel for plaintiff were entitled "In the Matter of Harry Morris Guaranteed Gusher Syndicate No. 3 and Mike Lyvers Syndicate in Bankruptcy." These claims otherwise were in similar form to those introduced by counsel for defendant except that they contained in their body no power of attorney.

178 Cross-Examination

I sold a number of other properties to the Natural Gas & Petroleum Corporation besides the Bilyou lease. These properties were appraised as required by the Bankruptcy Act

and the appraisal filed with the Referee. I cannot give the value of the Johnette lease because the properties were not valued separately so far as the sale is concerned. It was a producing lease and had a commercial value. The net proceeds of operation from the time the contract was made with the Natural Gas & Petroleum Corporation, and until the final deed was delivered, went to the Natural Gas & Petroleum Corporation. The same thing applies to all other production on the property included in the deed. This resulted in indemnifying the bankrupt estate against loss. The $25,000.00 cash payment was paid prior to January 24, 1925, and the balance, $100,000.00, was paid about the time of the final delivery of the deed, which was March 2, 1925.

I have read the petition filed before the Referee by Harry Miller, seeking to set aside the sale to the Natural Gas & Petroleum Corporation, and have read the answer filed by the Natural Gas & Petroleum Corporation to said petition. There was no off-set against the purchase price of $125,000.00. They paid me that full sum prior to February 28, 1925, and when the operations ceased—finally closed, on March 2, I gave them a check for the overplus; that is, for the profit that accrued while the details were being closed up. I simply accounted to them for the profits and gave them the money. I had previously received the $125,000.00. The purchase price was paid to me in the equivalent of cash. The first item was a Cashier's check for $25,000.00 in New York Exchange. The balance was paid in New York Exchange at Texarkana, was accepted by the bank as money, and my account as Trustee was credited with the $100,000.

I read the answer of the Natural Gas & Petroleum Corporation in the intervention of Harry Miller in the bankruptcy proceedings. It was signed by Jeff Davis, and it denied that the sum of $125,000.00 was an inadequate price, and alleged that the amount of money which it should pay under the contract, together with the funds which the Trustee has in his hands was sufficient to pay all bona fide claims.

Miller was a disgruntled creditor, and after a long contest a settlement was made with him, possibly in March or April, 1925, and also with the Knapp Engineering Company. The date of the settlement was April 15, 1925.

179 The original deed that Mike Lyvers signed, conveying the property to me as Trustee, was prepared in my office at Texarkana. I did not prepare the second deed. That was prepared in ElDorado by Mr. Keeney, or by my

stenographer; I was supervising the work. The second deed was taken in connection with the curative work which the Natural Gas & Petroleum Company was doing at that time. I had in my possession some of the stub books of the Mike Lyvers Syndicate. They were all taken to Texarkana and kept in my office until the bankruptcy proceedings were closed in 1927 and I was discharged, and then they were placed in the basement of the State National Bank Building, in a room that I had. The bank finally asked me for the room, and I told them that they could destroy those records for me, and they burned them up. I never got possession of the books of the Harry Morris Guaranteed Gusher Syndicate No. 3. I got hold of what purported to be a reconstructed record in connection with a contest between the Treasury Department and myself with reference to an income tax claim against the Morris estate, which I won, but I do not think I ever had the original books.

At the time of the contract with the Natural Gas Company the average monthly production of the Morris properties ran between five and six hundred barrels per day. That is, on the Laney, Hill, Mullins and Johnette leases. It was something less than 8,000. About $6,000.00 net was the amount that I turned over to the Gas Company after March 2. That payment was authorized by the Referee and covered the period between January 23rd and February 28, 1925.

GEORGE G. REYNOLDS

I am Deputy Circuit Clerk of Union County, and as such have in my custody the original deed records of the County. I have in my hands Volume 201 of the original deed records, and at page 196 there appears a quitclaim deed from Mike Lyvers, Trustee, Mike Lyvers Syndicate, to H. M. Barney, Trustee. (The record is here introduced in evidence, it being stated that the deed, February 20, 1925, was executed for the purpose of curing and correcting the original quitclaim deed executed by Lyvers as Trustee to Barney as Trustee, on October 13, 1924.) The substance of the deed is as follows:

Mike Lyvers personally and as trustee for Mike Lyvers Syndicate quit-claim to H. M. Barney as trustee for Harry M. Morris Guaranteed Gusher Syndicate No. 3, Harry M. Morris Trustee, and Harry N. Morris Bankrupt, all of his right, title and interest in and to the NW¼ of the

NW¼ of Sec. 9, Two. 16 South, R. 15 West, Union
180 County, Ark., the deed reciting that it was made for the purpose of correcting a quit-claim deed between the same parties theretofore executed which erroneously described the said land. This deed was signed "Mike Lyvers" and "Mike Lyvers as trustee for Mike Lyvers Syndicate", was properly acknowledged and was recorded in the deed records of Union County, Ark., on February 20, 1925, at 2 o'clock P. M. and recorded in Record Book No. 201, Page 196 of the deed records of Union County, Ark.

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181 H. W. CAWTHON

I am Assistant Cashier of the First National Bank of ElDorado, and during 1924 was in charge of keeping the records of the money deposited in the bank as lease rentals on oil and gas leases in this county. I have before me the record book containing a memorandum appearing to be a record of a rental deposited on May 17, 1924, and which appears to be signed by me. The signature is mine and this is the permanent record of the bank of rental deposits. The record, which is here introduced in evidence, acknowledges the receipt from H. M. Barney as Trustee of $40.00 to the credit of J. A. Bilyou and wife, for rental on an oil and gas lease dated May 17, 1922, upon the NW¼ of the NW¼ of Section 9-16-15.

ZEL SMITH

I am an employee of the First National Bank of ElDorado, Ark., and as such keep the lease rental records of that bank. These records were in charge of Mr. H. W. Cawthon before I took charge of them. I have investigated those records and find that there was no rental deposit made to the credit of J. A. Bilyou as lease rentals on the NW¼ of the NW¼ of Sec. 9-16-15, Union County, Ark., for the year 1924, other than $40.00 deposited to his credit as rentals on the lease covering that property by H. M. Barney, Trustee in Bankruptcy.

G. G. POPE

I was Referee in Bankruptcy of the Texarkana District of the Western Division of Arkansas during the years 1923, 1924, and 1925. About the last of December, 1923, the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry Morris, Trustee, bankrupt, was referred to me as Referee.

Also, the matter of the bankruptcy of Harry Morris. The two matters were consolidated under my orders. In these bankruptcy proceedings there were administered the properties of the Morris Guaranteed Gusher Syndicate No. 3, Morris Drilling Company, Mike Lyvers Syndicate, Mike Lyvers, Trustee, and Workman's Syndicate.

"Q. Did you also administer on Morris Drilling Company? A. Morris Drilling Company.
Q. And Mike Lyvers Syndicate?
A. Mike Lyvers Syndicate."

182 (Whereupon counsel for plaintiff objected because the best evidence of what he administered on is the reference itself. The Court overruled the objection. Counsel for plaintiff reserved a bill.)

The list that I have in my hand, marked "Plaintiff's Exhibit No. 1," is the list of the unitholders of Mike Lyvers Syndicate that we used in the bankruptcy proceeding. The list carries the name and address of each unitholder of Mike Lyvers Syndicate. During the course of the bankruptcy proceeding I sent out notices to the unitholders of Mike Lyvers Syndicate. I have copies of some of the notices with me. The card which you hand me is one of the notices sent out to unitholders and creditors. In the month of October, 1924, this notice was sent to each unitholder shown on the list which I identified and which I now hold in my hand. They were sent by placing them in the U. S. Mail, addressed to each unitholder. (Witness here exhibits one of the forms sent out, which was introduced in evidence as Defendant's exhibit No. 22). A correct copy of this form is attached to defendant's answer as Exhibit A.

(Witness then identifies a form of another notice sent out to unitholders, which notice he states was sent to all persons that appeared on the list of unitholders of Mike Lyvers Syndicate.)

The additional two notices handed me by counsel were each of them sent out to unitholders of Mike Lyvers Syndicate in the manner that I have testified.

(The three notices identified by the witness were here introduced in evidence as exhibits 23, 24 and 25 respectively, and are as follows:

"In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In Re Harry Morris Guaranteed Gusher Syndicate No. 3, Bkt., No. 674, 677.

Notice is hereby given that the first dividend of 25% on the unsecured claims is hereby declared, payable by the trustee on May 12, 1925. No dividends will be paid on the deferred claims of unit holders of the various series of units, including the Harry Morris, trustee, the Workingman's Syndicate, Harry Morris Guaranteed Gusher Syndicate No. 2, Harry Morris Guaranteed Gusher Syndicate No. 3, Mike Lyvers, Syndicate, Mike Lyvers, trustee, etc., until the unsecured claims for labor and materials furnished the bankrupt are paid in full. Due notice will be given of all dividends. Notice is also given that H. M. Barney as receiver has filed his petition asking for a fee of $5000, and as trustee asking for the maximum fees allowed by law for operating properties, and same will be heard on May 12, 1925, at the office of the referee. Also approval of settlements of controversies by the trustee will be heard on May 12, 1925,
183 at the office of the referee, or at any adjournment.

This April 21, 1925.

G. G. POPE, Referee in Bankruptcy,
Texarkana, Ark."

"D. X. 24

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, No. 674, 677.

To All Class of Creditors:

You are notified that the second dividend of 25% on unsecured claims for material and labor furnished the bankrupt will be paid on July 6, 1925. No dividends will be paid on the deferred claims of unit holders of the Harry Morris, trustee Workmans Syndicate, Harry Morris Guaranteed Gusher Syndicate No. 2, Harry Morris Guaranteed Gusher Syndicate No. 3, Mike Lyvers, trustee, Mike Lyvers Syndicate, Morris Refinery, Morris Drilling Co., or any other series of certificates, until all claims for labor and material are paid in full. Will Steel and A. D. Keeney as attorneys for the trustee in litigated matters since Jan. 29, 1924, filed

their petition asking for a fee of $20,000, which will be heard at the office of the referee in the City at Texarkana, Ark., on July 6, 1925, at which time all objections must be filed in a formal manner to be considered.

GUSTAVUS G. POPE,
Referee in Bankruptcy."

"D. X. 25

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the matter of the Harry Morris Guaranteed Gusher Syndicate No. 3, Mike Lyvers, et al., Bankrupt No. 674, 677.

All property belonging to the estate had been disposed of by the trustee in bankruptcy, and all debts paid amounting to $380,417.96. The trustee H. M. Barney has a balance on hand of about $6,000 cash to be distributed among the unit holders; unless the Government has a claim for income tax allowed. This is still being investigated. Deferred claims of unit holders allowed amount to $2,200,000. There are 20,000 unit holders. The final meeting is postponed to July 1, 1927.

The referees office has no definite information as to the Moco Oil Co.; J. E. Webber & Co., nor any other concern pretending to transfer units. The units are not transferable and only unit holders at the time of bankruptcy on Nov. 20, 1923, are considered creditors and entitled to file claims. It is now too late to file claims of any kind.

GUSTAVUS G. POPE,
Referee in Bankruptcy,
Texarkana, Ark."

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184 The unitholders of all of the Syndicates,—Mike Lyvers Syndicate, Morris Guaranteed Gusher Syndicate No. 3, and Daniel Boone Syndicate were treated on the same basis in the bankruptcy matter. Any proceeds that we have left over after paying the commercial creditors were divided among all the unitholders of the various syndicates on the same footing.

(At this point the witness identified, and there was introduced in evidence, the petition filed before the Referee March 18, 1925, on behalf of L. J. Zug, et al., describing

themselves as unitholders of the Mike Lyvers Syndicate, praying that the sale of the Bilyou lease and the deed from Barney, trustee, to the Natural Gas & Petroleum Company be set aside and title revested in the Mike Lyvers Syndicate. Said petition, response and order were introduced as defendant's exhibits 26, 26A and 26B. Correct copies of said respective documents are attached to defendant's answer as exhibit D, E, and F, respectively, and are set forth in the record as such.)

(The witness also identified, and there were introduced in evidence, the response filed February 15, 1924, by Barney as Trustee to the intervention filed by Mike Lyvers, in which he claimed title to the Bilyou lease. A correct copy of the response is attached as exhibit B to the defendant's answer and appears as such in this record.)

(The petition of Barney, as trustee, for summary order requiring Mike Lyvers to execute a quit claim deed to him as trustee in bankruptcy was also identified and introduced in evidence at this point. A correct copy of said petition is attached to the defendant's answer as exhibit C and as such appears in this record.)

185 Cross-Examination

None of the claims filed by unitholders as deferred creditors in the bankruptcy proceeding were filed after December 23, 1924. Some of the claims do bear filing marks as of a date later than December 23, 1924. Some of them bear filing marks as of December 31, 1924, and some bear filing marks as of January 10, 1925, and other dates in January, 1925. That was caused by the fact that quite a number of the claims when originally filed were not properly prepared and had to be returned and then refiled; and in such cases I filed them as of the last date.

WILLIAM MCCOMB

I am Development Engineer and Agriculturist for the Louisiana & Arkansas Railway Company. In 1923 I became familiar with the properties of Harry Morris, Trustee, and the Morris Guaranteed Gusher Syndicate No. 3. In March, 1923, I made a survey of these properties and an appraisal and an examination of the field. I also met several of the unitholders of the trust estates that Harry Morris was operating, including Willis B. Gauble of Peoria, Illinois, Anthony Doll of New York, and B. C. Caldwell, whom I met in Abbyville, Louisiana.

I obtained a list of all of the unitholders in the Guaranteed Gusher Syndicate No. 3, the Harry Morris and the Daniel Boone Syndicate, and the Mike Lyvers Syndicate. I had a list of the Mike Lyvers Syndicate unitholders just like the one Judge Pope had in the Bankruptcy Court. I think it was mine from which Judge Pope's was taken. When the bankruptcy was first initiated we sent a Mrs. Alford, who was in the employ of the reorganization committee, to Texarkana, and she, together with Judge Barney's stenographer, made a complete list of all of the unitholders that they had. That was supplemented by a list which we made from the stub books of Mike Lyvers Syndicate which we discovered. That was the mailing list that we used throughout.

The instrument that you (Mr. Davis) are handing me is a call, which was mailed to all the unitholders of the Harry Morris and Mike Lyvers organizations, of a meeting to be held in Washington, D. C., for the purpose of discussing plans for reorganization. These notices were mailed to those persons whose names are on the list of Mike Lyvers Syndicate as having their residence in the vicinity of Washington City. Mrs. McComb held a meeting at Wash-
186 ington with the unitholders in January, 1924, and I held one perhaps in March of that year, I won't be sure. At this particular meeting there were present unitholders of the Mike Lyvers Syndicate. We got their names off of the list we had with us and we kept minutes of
187 these meetings. From these minutes we checked people present against the lists that we had with us, thus determining who they were. We were giving transfers into the reorganization and were constantly checking to get the correct addresses of the various unitholders of all these Syndicates. There were Mike Lyvers unitholders present; in fact, I remember only one meeting of the twenty-one or two meetings that I attended where there were no Mike Lyvers unitholders; and I think that meeting was postponed. At the Washington meeting I made a talk and stated the fact of the State receivership, the fact that we had placed the Morris Guaranteed Gusher Syndicate No. 3 in bankruptcy in order to avoid a sale, because Williford had contracted to sell it at an inadequate price to the prejudice of all the unitholders, including the properties of the Boone and Mike Lyvers Syndicates; that a plan of reorganization had been adopted; that we had worked out the plan of having the attorney for the unitholders committee work with the Trustee in Bankruptcy so that a special sum could be raised to pay the indebtedness and sufficient working capital obtained to

develop the property; that all the Morris properties were to be taken over and formed into the reorganization corporation. We had powers of attorney with us and which we had the unitholders sign, in which powers it was stated that the purpose of the new corporation was to buy the properties in bankruptcy. I stated to them that all the properties mentioned were in the hands of the Referee in Bankruptcy. We held meetings with the unitholders in New York, Philadelphia, Washington, Pittsburgh, Buffalo, Cleveland, Boston, Chicago, Indianapolis, Los Angeles, San Francisco, Portland, Seattle, Kansas City and, I think, Butte, Montana. I think we also held a meeting at the Wheeler House in Baltimore. These meetings extended over the period from November, 1923, to April, 1924. According to my recollection, unitholders of the Mike Lyvers Syndicate were present at all of those meetings with the exception of Boston. I usually attended these meetings in person, and in addition to the meetings that I attended, there were other meetings held by other people. At each of these meetings I made an address to the unitholders present, and at each one of them I stated in substance what I stated to the unitholders present at the Washington meeting. We formed the corporation in April, 1924. It was called the Moco Oil Corporation, and its offices were at ElDorado. Willis B. Caldwell was President, I was Vice-President and General Manager, and C. B. Beach was Assistant Secretary and Treasurer. The corporation published a newspaper called "The Moco News". It
188 was issued once a month and there were twelve issues published, the publication beginning soon after the organization of the Moco Oil Corporation and being dated May, 1924. I edited the paper. Each publication was mailed out to the unitholders of the Mike Lyvers Syndicate in accordance with the list of unitholders in our possession. Previous to the time we began mailing out the newspaper we had gone over the country to the meetings above referred to and had talked to the unitholders personally, and had also mailed them periodical letters. One of the main purposes of the first newspaper mailed out was to notify the unitholders of the Mike Lyvers and other Syndicates of the reorganization plan of the committee, and the account of the whole plan was published in the first paper.

The instrument now exhibited to me is a power of attorney made out to A. D. Keeney, which power was sent to all of the unitholders of the Mike Lyvers Syndicate and other associated Syndicates, as a part of the reorganization plan. The power of attorney is coupled with a proof of claim in bank-

ruptcy. A blank form of this power of attorney and proof of claim in bankruptcy. A blank form of this power of attorney and proof was sent to each person shown on the list of unitholders of the Mike Lyvers Syndicate in January, 1924, and I got back from the unitholders a large number of them, which I understand were filed in the bankruptcy matter. In some instances they were sent by the unitholders direct to the Bankruptcy Court and in others to the Moco Oil Company.

(It is unnecessary to state the substance of these powers of attorney, for the reason that their substance has previously been stated in the narrative of the testimony of H. M. Barney, the said instruments combining a proof of debt in bankruptcy by the unitholder with a power of attorney to A. D. Keeney authorizing the latter to represent the unitholder in all matters connected with the bankruptcy proceeding.)

At this point there was also identified by the witness and introduced in evidence a large number of powers of attorney from Mike Lyvers unitholders executed and sent by them to Dr. McComb during the summer of 1924, all of them being on the same form. These powers of attorney were given to William McComb as attorney in fact and are limited solely to the assets of Mike Lyvers Syndicate, Mike Lyvers Trustee.

The form of power of attorney is as follows:

"I, ... of the County of ..... and State of ....., do hereby make, constitute and ap-
189 point William McComb my true and lawful attorney, for me and in my name, place and stead, to act for and represent me in all matters pertaining to the Mike Lyvers Syndicate, Mike Lyvers, Trustee, in which I hold ..... units of the par value of $10.00 each; I further authorize my said attorney William McComb to vote the above units in any meeting for whatever purpose called, and to use his best judgment in deciding on actions to be pursued relative to any litigation or other matters affecting the properties or assets of the Mike Lyvers Syndicate, Mike Lyvers, Trustee; I further authorize my said attorney to bring suits or other actions against such parties as in his judgment may seem fit and proper, and to that end to employ suitable counsel; I further authorize my said attorney to receive and collect any money or moneys due to me by the said Mike Lyvers Syndicate, Mike Lyvers, Trustee, and to fully receipt for same; I further authorize and empower my said attorney to exchange any or all of my units in the Mike Lyvers Syndicate, Mike Lyvers, Trustee, for an equal number of units or shares of stock in

Moco Oil Corporation; hereby ratifying and confirming whatsoever my said attorney may do in the premises as freely and to all intents and purposes as I might do if present in person.

Witness my hand and seal this the....day of....., 1924."

I sent out this power of attorney to all persons whose addresses were on our list of unitholders of the Mike Lyvers Syndicate, and I received back many others besides those which have been introduced in evidence. The ones introduced in evidence are only a small part of those that were received back by me. In the absence of a cross-check I should say that we got powers of attorney from a substantial majority of the unitholders. I filed the bankruptcy petition in the matter of Harry Morris Guaranteed Gusher Syndicate No. 3. Willis Cauble, Chairman of the Reorganization Committee, Anthony Dill and W. B. Caldwell, all of whom were members of the Reorganization Committee, joined in the petition.

The issue of the Moco News now exhibited to me, and the instrument that was attached to it, was sent out by us to each person shown on the list of unitholders of the Harry Morris Guaranteed Gusher Syndicate No. 3 and the Mike Lyvers Syndicate. It was sent out within a day or two after the date of publication November 24, 1924.

190 (The instrument attached to the paper here was introduced in evidence as plaintiff's exhibit No. 30. Under the heading "Properties owned by Morris Estate to be acquired by Moco Oil Corporation from the Bankruptcy Court", it lists a large number of oil and gas leases, among which appears the Bilyou lease referred to as "Balyou farm, 40 A. NW¼ of the NW¼, Sec. 9-16-15; Union County, Arkansas; full ⅞ interest; after $34,000. paid out 7/16 oil."

At the meetings that were held over the country with the unitholders I stated to those present that the properties of the Mike Lyvers Syndicate, together with the properties of the other Morris Syndicates, were being administered in the Bankruptcy Court. The letter now exhibited to me was issued by the Moco Oil Corporation April 18, 1924, and was sent out to all the unitholders of the Mike Lyvers Syndicate, and other Syndicates, for the purpose of securing their cooperation and telling plans of the Moco Corporation, and for the purpose of obtaining a transfer of their units to the Moco Oil Corporation and their powers of attorney to A. D. Keeney, or some other attorney, for the purpose of securing the transfer

of claims in the Bankruptcy Court, in order to enable us to buy the property as it was sold by the Trustee in Bankruptcy.

(This letter stated in some detail that the Moco Oil Corporation had been organized for the purpose of acquiring the "Morris properties" from the Trustee in Bankruptcy who was then in possession of those properties, for the purpose of liquidating them. It explained that the unitholders of the trust estates in which these properties were, including Mike Lyvers Syndicate, would be allowed to exchange their units for the common stock of Moco Oil Corporation share for share, and that they would be asked to buy first mortgage bonds of Moco Oil Corporation to raise enough money to allow that corporation to buy all of the Morris properties held by the Trustee in Bankruptcy, which were to be operated for the benefit of those unitholders who came in to the reorganization plan. The letter stated: "Only Morris, Boone and Lyvers unitholders can share in these profits."

191 Within a week of the execution of the contract between Mr. Barney as Trustee and the Natural Gas & Petroleum Corporation, of January 23, 1923, I learned about it, and soon after that I wrote and mailed a letter to the Mike Lyvers unitholders, along with the unitholders of the other Syndicates, notifying them of the contract. The instrument now exhibited to me is a copy of that letter. About the time of the writing of this letter, the Moco Oil Company made an attack upon the contract between Barney as Trustee and the Natural Gas & Petroleum Corporation. I was instrumental in having the petition of the Moco Oil Corporation, attacking the contract, filed in the bankruptcy matter, and I signed the verification on the petition. A copy of the petition was sent with each letter to the unitholders.

(At this point the copy of the above letter and the petition of the Moco Oil Corporation were introduced in evidence as defendant's exhibits 31 and 32, respectively. In substance they are as follows: This letter was written on the letter head of Moco Oil Corporation and was dated February 12, 1925. The letter stated at considerable length the fact that the Moco Oil Corporation had been engaged in attempting to save the "Morris properties" for the unitholders. It stated that on February 23, 1925, H. M. Barney as Trustee in Bankruptcy had entered into a contract to sell all of the Guaranteed Gusher properties to Natural Gas & Petroleum Corporation for $125,000.00 while the Moco Oil Corporation had

agreed to pay $155,000.00 for those properties and that the Moco Oil Corporation had filed an intervention in the bankruptcy matter asking that said purported sale be set aside and that it be allowed to purchase the properties. This letter recited that it enclosed a copy of the petition of the Moco Oil Corporation referred to.

The petition of the Moco Oil Corporation which was defendant's Exhibit 32, was filed in the matter of Harry Morris Guaranteed Gusher Syndicate No. 3, Harry N. Morris Trustee, and Harry N. Morris in bankruptcy, by Willis B. Cauble, Moco Oil Corporation, et al. alleging that when the Morris properties were in receivership in the Chancery Court of Union County, Arkansas, a committee of unitholders of Harry Morris Guaranteed Gusher Syndicate No. 3 caused a petition in bankruptcy to be filed against Harry N. Morris
Guaranteed Gusher Syndicate No. 3, Harry N. Morris
192 Trustee, to prevent a sale of the "Morris properties"
by the said receiver in order that the unitholders in the various Morris properties might be reorganized and purchase these properties under a reorganization plan; that the Moco Oil Corporation was formed for that purpose, and that the Trustee in Bankruptcy for Harry Morris Guaranteed Gusher Syndicate No. 3 agreed to refrain from selling said property until that corporation should have a reasonable length of time to raise the money from unitholders to buy said property; that the Moco Oil Corporation had purchased certain of said properties from the Trustee in Bankruptcy and was then in process of raising additional funds from Morris unitholders to buy the remaining property in the hands of the Trustee; that he sold all these properties to the Natural Gas & Petroleum Corporation for a grossly inadequate consideration; that the Trustee in Bankruptcy had entered into said contract without notice to the Moco Oil Corporation and in breach of his agreement to allow them to purchase this property, and that the Moco Oil Corporation was ready and willing to pay $155,000. for said properties. The petition prayed that H. M. Barney be ordered not to consummate the sale of said properties to the Natural Gas & Petroleum Corporation until petitioners had a reasonable time in which to raise $155,000.00 to purchase said property in the name of the Moco Oil Corporation, and in the alternative that the contract of sale between H. M. Barney as Trustee, and the Natural Gas & Petroleum Corporation be set aside and annulled.)

The letter now exhibited to me is one of our form letters that was mailed to the unitholders of the Mike Lyvers and other Syndicates about March 6, 1925.

(The letter was here introduced in evidence as defendant's exhibit No. 35, and the material paragraph thereof is as follows:)

"Regarding our legal status in respect to the attempted sale by the Trustee in bankruptcy of the remainder of the Morris property to the Natural Gas & Petroleum Company, for your information permit me to say that a fifth action is being filed at Texarkana this week to set aside this attempted sale. This was filed by a Mr. Zeller from Chicago, who is a unitholder in the Mike Lyvers Syndicate. In my opinion, and that of several attorneys, it will effectually stop the sale so far as two of the properties are concerned. One of the properties involved is the Balyou Farm of 40 acres, lying in the heart of the deep oil sand area. It is our opinion that Judge Youmans, when the case comes before him, will take cognizance of the allegations set up in the complaint, and that he will order an accounting and the restoration of the properties to Mike Lyvers unitholders."

193 Subsequent to the filing of the Moco Oil Company petition I arranged for the filing of the petition by Zug, Zimmer and Wilson, and a few of those who were working with us to carry out the reorganization.

Defendant's Exhibit No. 26 is the petition to which I refer. Before the filing of this petition, I had acquired the powers of attorney from the Mike Lyvers Syndicate unitholders, and in having the petition filed I was acting in their behalf. Defendant's Exhibit No. 35, which is the last letter introduced in my testimony, refers to the Zug, Zimmer and Wilson petition.

All of the issues of the Moco News were mailed to the unitholders of the Mike Lyvers Syndicate as they were published. The paper now exhibited to me is the middle sheet of the Moco News of February 1, 1925. Toward the bottom of the sheet there is a map which carries a description of the Bilyou lease and which shows two wells of the Lion Oil Refining Company, and gives their production. (The sheet was here introduced in evidence, showing the map referred to. This map was entitled "Moco holdings in respect to 2300 foot production." It showed in bold outline a lease belonging to Moco Oil Corporation covering the NE¼ of the SW¼ of Section 5, and the North half of the SW¼ of Section 5, Twp. 16 S., R.

15 West, Union County, Arkansas. It showed also the NW¼ of the NW¼ of Sec. 9, Twp. 16 S., R. 15 West, which forty acre tract is marked on the map "J. A. Bilyou—Lyvers lease" The map also shows the SE¼ of the SW¼ of Sec. 3, Twp. 16 S., R. 15 West, which forty acres is marked as follows: "Graves-Lion Lease", and on this last described forty acres there are shown two producing oil wells. No. 5 is shown to be making 1500 barrels of oil per day, and No. 6 is shown to be making 800 barrels of oil per day.)

The paper now exhibited to me is a copy of the Moco News published about April 1, 1925, and which was sent out to the various unitholders some time in that month. On the last page of the issue appears the following article:

ElDorado, Ark., March and April, 1925.

Mike Lyvers

Mr. Zimmer of Chicago and several other unitholders have employed counsel to bring an action against the Trustee in Bankruptcy to have the sale to the Natural Gas & Petroleum Corporation of the residue of the Morris properties set aside.

194 This sale included the very valuable Bilyou forty acres in the Northwest Quarter of the Northwest Quarter of Section 9-16-15. This is one of the most valuable properties in the deep sand area and has just been offset by the Pure Oil Company with a well, which came in making between six and eight thousand barrels. Coulter & Coulter, attorneys at law, of ElDorado, are the attorneys of record in this case. No date of hearing has been set yet.

(The last page of the paper containing the above article was here introduced in evidence.)

After the Moco petition and Zug petition had been denied, I took no further steps in the bankruptcy matter.

I remained at ElDorado during the fall and summer of 1925, and was familiar with the development of the Bilyou lease by the Natural Gas & Petroleum Corporation during the early spring and summer of 1925. I was on the lease several times and was there after the wells were completed on it. When the Natural Gas & Petroleum Corporation acquired it, it was a nonproducing lease. After the first wells were completed it produced oil in large quantities.

195 After the petition of Zug and his associates was denied, I tried to get Mike Lyvers to substitute me as

Trustee in the trust estate of Mike Lyvers Syndicate for the purpose of bringing another suit against the Natural Gas & Petroleum Corporation. I was going to bring it outside of the Bankruptcy Court in an effort to set aside the sale to them and restore the property to me as Trustee of the Lyvers unitholders. I was going to include in the suit the Bilyou lease. Lyvers showed in these conferences that he knew of the development of the Bilyou lease. We discussed its value and the large quantities of oil being produced from it.

Cross-Examination

I was acquainted with the values of the properties that I was discussing in the various letters sent out to the unitholders. I had made no separate appraisal of the properties. I appraised all of what we called the Morris group, including the Mike Lyvers Syndicate properties which appraisal was included in a complete report covering all the property listed by the Morrises in their several Syndicates. The appraisal was made in April, 1923.

"Q. Doctor, did you send out to anybody, or did you ever have printed, and particularly in the Moco News that you sent out in April, 1925, the following statement:

'I was much astonished on arriving there to find Judge H. M. Barney, the Trustee in Bankruptcy, already in Peoria and to learn that Judge Barney had insisted to Dr. Cauble, President of the Moco Oil Corporation, that he cause the pending petitions to be withdrawn and permit the sale to the Natural Gas & Petroleum Corporation to stand unchallenged. I had a joint interview that evening with Judge Barney and Dr. Cauble. On this occasion Judge Barney told both Dr. Cauble and myself of the direful things that would befall us unless these petitions were withdrawn and the sale to the Natural Gas & Petroleum Corporation allowed to stand. Judge Barney questioned my good faith in bringing these actions and I told him that I did not need any guide for my actions, that all of the threats and prophecies that might be levelled at me would not in the slightest swerve me from doing what I believed my duty. I explained to Judge Barney fairly why I was unable to accept the compromise at the time the Natural Gas & Petroleum Corporation offered one, which explanation afterwards he attempted to twist in another and entirely different meaning. In this conversation Judge Barney intimated that both Dr. Cauble and myself would be indicted unless these petitions would be withdrawn, on just what grounds he failed to state.'

"A. Yes, I wrote that.
"Q. Is the statement in that paper the truth?
"A. Correct."

I have forgotten what wells had already been brought in in the Graves sand by February 24, 1925. They were East of the Bilyou lease. It would be very difficult to say what was the value of the Bilyou lease on that date. Some leases were away up and some away down. It is very difficult to determine the value of any particular lease at that time. I dictated the petition in the Zug case. The recitals therein were true and correct to the best of my knowledge and belief. This is identified as defendant's Exhibit 26.

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I dictated the affidavit signed by Mike Lyvers, attached as an exhibit to this petition, and the facts therein stated are true and correct to the best of my knowledge and belief.

(At this point counsel for defendant asked that the testimony as to the exhibit attached to the Zug petition be stricken out as not being on cross-examination, and the court ordered them stricken unless the witness were accepted as the plaintiff's witness. The plaintiff declined to accept, and reserved his exception to the Court's ruling.)

I was on the Bilyou lease after the development had started. The first well was drilled by the Natural Gas & Petroleum Company in the spring of 1925. I was on the lease at various times before the derricks were up and after they were up and when the wells were in. I think the Natural Gas & Petroleum Company made four locations immediately after taking possession of the lease. My recollection is they had several wells drilling at one time,—started them close together. At the time they started those drilling operations, there had been several wells brought in over on the Graves sand, but the location of that sand was a mooted question at that time; no one knew the extent of it. I would say that in the public opinion very few people knew the extent of the Graves sand. I had pretty good reason that I was correct, but it was an opinion, and when all was said and done I was at least a mile too far South on my calculation, and a mile short at the North. I would think that the fact of the bringing in of the well known as Graves No. 6, in December, 1924, was pretty substantial proof of the existence of the sand in that area, and I think that there was a large increase in values after that well came in. I believed that it pertained to this particular lease; but to make it perfectly clear, I was one of the people regarded as a fool; I

was laughed at for making that belief known. My recollection is that while these drilling operations were in progress the Pure Oil Company on adjoining lease had brought in a big well in the Graves sand. And I think that on another forty near by, on the other side of the lease, the Lion Oil Company had previously brought in a large gas well
197 of sixty-five to one hundred million feet. These conditions existed when the drilling operations were started on this lease. I imagine there were half a dozen wells that had been brought in in the Graves sand by about March 16, 1925. It was my judgment that these wells proved the Bilyou lease for deep sand production. I should think it could have been called in the center of the play. The Graves sand wells were very large producing wells, but we did not know much about drilling them right then. It is a fact that all of the operators in the field were stimulated to drilling activities about that time. There was very great activity. I could not tell how many wells were drilling at any specific time, but there were a number of rigs throughout the field. The particular area had already been drilled for the Nachitoches sand. It was not practical to use the Nachitoches wells for deep sand production. It was necessary to drill other wells.

198 At the time the Natural Gas Company started its wells on the Bilyou lease, it was in the center of a territory probably a mile wide and two miles in length. It was about the same general character as far as the sand was considered. This territory extended over to the Flenniken lease and East of the Graves.

I think there was as much activity in that field in that particular section as at any time in previous history, if not more. I think we had some days here when this field had the largest production of any field up to that time in the history of the world.

The Hill B. lease was included in the list of properties sold to the Natural Gas & Petroleum Company on January 23, 1925, and in the deed executed on March 2, 1925. In the petition filed by the Moco Oil Company the entire sale of all the property was attacked.

HOWARD A. MATTHEWS

I was a scout making reports in the Smackover field in the year 1925. In making my reports I get the name of the well,

its location, and what it is doing up to the time it is abandoned or completed.

During 1925 I kept a weekly record of every well being drilled in the Smackover field North of ElDorado. I kept the information and have my original notes from which I compiled it.

I have prepared a map showing the condition of the North field in the vicinity of the Bilyou lease on January 22, 1925, which I have with me. This map shows the wells drilling and completed up to January 22, 1925, but the production given on the map is initial production. On some of the leases there were three or four wells at the time the map was made. The map shows all of the wells that had been completed in the territory covered by it, and gives the initial production of each. On that date there had not been any well completed to the Graves sand, which was 2300 feet, in any of the area covered by this map.

199 (At this point the map was introduced in evidence as defendant's Exhibit 37, which exhibit is attached hereto.)

I now produce a map of the same area showing date of March 12, 1925. This map shows the developments in the new 2300 foot sand, and it also shows the shallow wells.

(The map is here introduced in evidence as Defendant's Exhibit 38, which exhibit is attached hereto.)

I have also prepared a map of March 12, covering the same area as that covered in Exhibit 37, which shows only the wells to the 2300 foot sand, which is the Graves sand. This map, which will be defendant's Exhibit No. 39; does not show the shallow wells. (The map is here introduced in evidence as Exhibit 39, which exhibit is attached hereto.)

I have also prepared a map showing the condition of that area as of September 13, 1925, showing the Graves sand completions and drilling wells at that time. It does not show the shallow well sand but is confined to wells that have been completed or were drilling to the new 2300 foot Graves sand by September 13, 1925. (The map is here introduced in evidence as defendant's exhibit No. 40, which exhibit is attached hereto.)

Cross-Examination

You have handed me a map dated as of March 18, 1925, purporting to show development in certain sections, includ-

ing Section 9, Township 16 South, Range 15 West. I have check the map personally from my contemporaneous data. The map is correct except in one particular. It is incorrect in showing the well in Section 9, marked Humble-Flenniken, B-3. That well was drilling. That well should be shown in the forty immediately below that known as the Sunny Jim Flenniken No. 3. Otherwise the map is correct. (The map is here introduced in evidence as plaintiff's Exhibit 24, which is attached hereto.)

Redirect Examination

The map just introduced as plaintiff's Exhibit 24 shows two wells as completed in the SW¼ of the SW¼ of Section 3-16-15. I have marked on the map, on one of those wells, the words "80% SW¼"., which means 80% salt water. While the well is shown to be making 8,000 barrels, yet 80% of that fluid is salt water. The other well on that forty is shown as making 4,000 barrels of fluid, but I have indicated that 20% of it is salt water.

200 I have in my hands another map purporting to show the state of development in the same section, as shown by plaintiff's Exhibit 24, as of date April 18, 1925, and I identified it as a correct map as a state of development at that time. (The map is here introduced as plaintiff's Exhibit 25, which exhibit is attached hereto.)

FOLD*OUTS ARE TOO LARGE TO BE FILMED

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H R. DICKERSON.

I am General Superintendent of the Arkansas Natural Gas Company and its subsidiaries. In the year 1923 I was General Superintendent of the Natural Gas & Fuel Corporation and of the Natural Gas & Petroleum Corporation. As General Superintendent of the Natural Gas & Petroleum Corporation I was in charge of the development of the Bilyou lease, covering the NW¼ of the NW¼ of Section 9-15-16.

I was with the Natural Gas & Petroleum Corporation and Natural Gas & Fuel Corporation in the above capacity from 1923 through 1925. I was familiar with the contract of January 23, 1925, between H. M. Barney, Trustee, and the Natural Gas & Petroleum Corporation. Before the deal was closed we had the titles of all of the property involved in that contract examined by the attorneys for the Company. The attorney for the Company stated to me that he approved the title to the Bilyou lease. That was when we acquired the property in 1923. I later had the title investigated by our attorney when we went to drill the first well, and it was again approved. We relied on our attorney's opinion in going upon the property. We had no information about the title other than his opinion. I at that time thought we had a good marketable title to the lease. When we acquired the Bilyou lease by the assignment of March 2, 1925, there was no oil or gas well on it. I do not know the exact date, but we started the drilling of our first well on that lease between the 5th and 10th of April, 1925, and I was directly in charge of the drilling operations. We started four wells on the Bilyou lease about that time, practically all at the same time.

I let the contracts all the same date for the drilling. Well No. 1 was completed on May 1. Well No. 2 was never completed. Nos. 3 and 4 were completed along about the 5th or 6th of May, and No. 6 was completed about the 6th or 7th, between the first and 10th of May. No. 6 was begun about April 20. No. 5 was not drilled during this period. The first three wells I have spoken of were completed approximately at the same time. There was not over three day's difference in the completion of wells numbered 1, 3 and 4. All three came in as oil wells.

I had charge of taking care of the oil from those wells, and I spent practically all my time on the lease. The first three wells, Nos. 1, 3 and 4, made a considerable amount of oil.

No. 6 came in after the first three were completed, and No. 2 was wholly lost.

208 Sometime about the 10th of May well No. 1 was at the peak. It was completed about May 1, but did not make a considerable lot of oil until we deepened it, and it came in at its peak about May 10. Between the 7th and 10th of May, while we were at the peak, the lease was making 40,000 barrels per twenty-four hour period from the three wells. I stayed out there about thirty-six hours during the peak production trying to hold the oil. It was coming out so rapidly we had difficulty in taking care of it. After well No. 6 was brought in sometime later in May we did further drilling,—deepened some of the wells; and worked some of them over later. After the completion of the first three wells, there was a very extensive drilling campaign in this area and there were numerous wells completed to that same sand thereafter.

Cross-Examination

It is true that the map of March 12, 1925, marked Defendant's Exhibit 39, does show a derrick up on a well indicated as No. 1, on the Bilyou lease, and shows drilling on a well indicated as No. 5 on the Bilyou lease, but I am not mistaken in my statement about the date when we started drilling operations. Well No. 5 was drilled prior to that time. It was drilled before Nos. 1, 2, 3 and 4 were started. It was completed sometime in April as a gas well. I think the output on well No. 5 started in March sometime, and it was completed as a gas well in April. I agree that the map shows a derrick up, but I am not positive that there was a derrick up on No. 1. The certified log furnished the State Conservation Department shows the competion of well No. 5 to be April 18, 1925. It was about a ten million foot gas well. We started drilling No. 4 April 27, 1925, and completed it May 6, 1926, according to the log.

The attorney who approved our titles was Mr. Jeff Davis. So far as I remember, his opinion was in writing, but I have no independent recollection of it now. There were not many wells being drilled in the particular area of the Bilyou lease at the time. I was familiar with the wells that had come in before in that area. The Sunny Jim well in Section 9-15-16 had been completed before we started drilling. The Lion Oil & Refining Company had a well in Section 3-16-15, but it was not in good completion at the time we started. It was making lots of water. The Hickman Graves No. 6 in Section 3-16-15

probably had been completed, and the George and
209 Jones Umstead No. 3, in Section 4-16-15, was completed. The initial production of that well was about 400 barrels. It increased its flow later on. My recollection is that Broderick and Calvert, Broadford No. 2, Section 8-16-15, was completed a few days after we started the wells on the Bilyou. My recollection is that four wells had been completed in the Graves sand at the time we started drilling. I do not think there were as many as eight.

When I started four wells on this lease my superiors thought I was starting too many for the amount of the wells drilled in the Graves stand. I thought I was going to get something, but some of the fellows up the line did not think so. Although I considered the territory proven, in fact it was not proven, since that closest well was a good distance. A man does not usually start four wells at once on a wild cat forty. I could not say how many wells were drilled and derricks were up around our lease while we were drilling these four wells. The Pure Oil Company moved in and offset us on the East with a bunch of rigs, and the Roxana on the South, the Standard on the North, and the Lion on the East. I started my well before they did. The Lion had a big gas well on the offset forty that had been drilled sometime when we started drilling, but it was in a different sand from the sand that the wells were producing oil from. Our company was in the oil and gas business at that time, but I would not say that a large part of our business then was in gas, although a good percentage of our revenue came from gas wells. We were selling gas to drillers in the oil field, but we were in the oil business then. Selling gas to drillers in the field is a paying business if you haven't got too much competition. There were other gas companies in the field. We had our share of the business and made some money. Gas wells were of some value at that time. There might have been that many rigs running before we got ours completed. They drilled that stuff mighty fast. We were working as fast as we could. It was our idea to get down to the pay sand and get the oil as quick as we could. At that time that was the general principle of developing on oil field. When we started drilling I think there were something like 20,000 barrels of Graves sand production. The production was around the Bilyou lease on most all sides. I think there were wells on four sides of us. We hoped we were in about the center of the pay on the Bilyou lease when we let the contract, but we did not know. The Bilyou lease had never produced oil in the Natchatoches sand at that time. I

thought it would produce oil. We got our peak production
on the Bilyou lease about the 10th of May. I don't
210 think it was the peak of the field. Our production
was at about the peak on the 10th, but I do not think
the field reached the peak until in June. I do not think the
field was producing as much as 300,000 barrels per day by
May 10. We had some other leases around the Bilyou in
about a quarter or half mile.

Recross Examination

At the same time we started well No. 1, we started a well in the South part of our forty, which is a quarter mile nearer the Flenniken No. 3.

Redirect Examination

While it is true that when we begun our drilling operations on the Bilyou lease there had been oil wells completed to the sand in four directions from us, yet some of them were as far as a mile and a half, and may be two miles away. The closest well to the Bilyou was the well that has been referred to as the Sunny Jim, in Section 9, and that was right at half a mile away to the South in the SW¼ of of the SW¼ of Section 9. This was three quarters of a mile from the well and a mile from our South line.

E. N. WATKINS

I am Secretary of the Arkansas Natural Gas Corporation, and have in my charge the permanent records of the company showing expenditures on the various oil and gas leases owned by it. I have with me the original ledger sheets showing the expenditures of the Natural Gas & Petroleum Corporation, Natural Gas & Fuel Corporation, and Arkansas Natural Gas Corporation on the Bilyou lease. I have gone over these records and have made a memorandum giving the recapitulation of the expenditures. The cost of drilling Bilyou No. 1 well was $37,920.31. This covers well and equipment which might have been put on the lease to accommodate the well. The cost of drilling No. 3 was $20,885.59; the cost of drilling No. 4 was $14,946.85; and the cost of drilling No. 5 was $29,173.65.

These expenditures were incurred during the months of March, April and May, 1925. Bilyou No. 2 was let to an independent contractor, who junked the well and did not get paid for it. In addition to the drilling costs there was paid during 1925 on the Bilyou lease an oil payment of $32,000.

00; and there were also miscellaneous costs amounting to $265.33, probably connected with the title and the recording charge against the lease. Bilyou No. 7 was drilled as a gas well in the first part of the year 1927. It might have been started in the latter part of 1926. The drilling cost
211 of that well was $18,386.20. Bilyou No. 8 was started April 4, 1927, and finished May 21, 1927. The cost of drilling and equipping that well was $13,553.85.

In addition to the above costs, we deepened Bilyou No. 4 in May, 1927, at a cost of $5614.49, and deepened Bilyou No. 5 in January, 1927, at a cost of $9517.04. In 1926 we installed on the lease an air compressor for more efficient production, and there was apparently a little investment expenditure on No. 7, and a small item of investment reclaimed on No. 4. The air compressor cost us $27,077.60. The total expenditure in drilling and equipping the wells on the property from the time we first begun until the first of January, 1928, is $221,554.33. In 1926 a small item of investment cost of $29.50 was added.

Cross-Examination.

I haven't the permanent records showing the receipts from the lease. I have a memorandum showing the production for each of the years. The company's interest in the production on the lease, that is the 7/8 working interest, for the year 1925, was $424,555.20. For the year 1926 it was $178,872.13, for the year 1927 it was $124,717.19. Those figures might be off just a few dollars. These figures for oil produced in 1925, 1926 and 1927 are gross income from the 7/8. The operating expenses for 1925 were $28,547.24, for the year 1926 it was $34,536.21, and for 1927 $36,200.89. By operating expense I mean expenditures that actually went into this particular lease.

C. R. Hoffer

I am a broker of oil and gas properties and live in ElDorado. I have been in that business about ten years, and was in the oil and gas lease brokerage business in ElDorado in the year 1925. At that time I handled the sale and purchase of oil and gas leases in the Smackover field, and I am familiar with such transactions in so far as purchases and sales are concerned in the vicinity of the Bilyou lease. I have examined the map marked Defendant's Exhibit 37. I was familiar with the area covered by that map as of January 22, 1925. I am also familiar with the value of oil and gas leases in the area shown on the map. Assuming that the Bilyou lease in

the NW¼ of the NW¼ of Section 9-16-15 was on January 22, 1925, burdened with an oil payment of $32,000.00 from 7/16 of the first oil and gas produced, and assuming that it was
212 a lease commonly known as Arkansas Form 88, requiring a payment of ⅛ of the oil as royalty, I do not think that the lease had any value on that date in excess of the oil payment. It could not have been sold for any cash consideration with the oil payment on it. At that time the lease was considered valuable only as to production from the shallow sand or Natchatoches sand. I have examined the map marked Defendant's Exhibit 39 and have refreshed my memory as to the condition of the area covered by that map as of the date March 12, 1925. I was at that time familiar with the value of the leases in that area. On account of the showing of the Lion well in the adjoining section as to the possibility of a deeper sand, I think the Bilyou lease had a speculative value on March 12, 1925, of $150.00 an acre in addition to the oil payment, which would be a value of $6,000.00 if sold subject to the oil payment. Assuming that on or about May 10, 1925, there was a gas well on the lease making approximately ten million cubic feet of gas, and three oil wells completed to the Graves sand which were making 40,000 barrels of oil per twenty-four hour day, in my opinion the cash market value of the lease on that date was from $600,000.00 to $800,000.00 in excess of the oil payment.

W. T. HAWLEY

I am an oil and gas lease broker, and have been engaged in that business about nine years. I was so engaged at ElDorado during the year 1925 and was familiar at that time with sales and purchases of leases in the Smackover field in the vicinity of the Bilyou lease. I am familiar with the cash value of leases in that area at that time. I have examined the map marked Defendant's Exhibit 37, and have refreshed my memory as to the condition of the field on January 22, 1925. In my opinion the cash market value of the Bilyou lease on that date, assuming that it was on the ordinary Arkansas Form 88, with a royalty of ⅛, and assuming that the lease was burdened with an oil payment of $32,000.00, was $100.00 an acre. By this I mean that it could have been sold for $4,000.00 for the ⅞ lease if it had not been burdened with the $32,000.00 oil payment. Being burdened as it was with the oil payment it had no cash market value.

I have examined the map marked Defendant's Exhibit 39, purporting to show the condition of the field in that area as of

March 12, 1925. In my opinion the Bilyou lease at that date, considering its form and that it was burdened with a
213 $32,000.00 oil payment, would have brought about $1,000.00 per acre, if the oil payment had not been on it. With the oil payment on it, it could have been sold for $8,000.00 in cash and $32,000.00 in oil, making $40,000.00. I remember the condition of the area in the vicinity of the Bilyou lease about April 10, 1925, after the Lion Graves well in Section 3 had come in, after the George and Jones well in Section 4 had come in, and after Sunny Jim well had come in down in Section 9. The Bilyou lease was still of speculative value after those wells had been brought in. Those wells were not sufficiently near the Bilyou lease to prove it as a producing lease.

Assuming that the Bilyou lease about May 10, 1925, had on it three wells completed to the Graves sand, with a production of 40,000 barrels per twenty-four hour day, and with a gas well on it making approximately ten million cubic feet of gas a day, in my opinion the cash market value of the lease on that date was $750,000.00 cash.

Cross-Examination.

In January, 1925, the value of settled production was $150.00 per barrel. The value of flush production depended on where the lease was and whether the oil lease was drilled or was yet to be drilled. Where the lease was drilled, the value of flush production was about $200.00 per barrel.

"Q. Then instead of a quarter of a million for a lease that would produce 40,000 barrels per day, it would have been eight million? A. No, sir.

Q. Isn't that 200 times 40,000 barrels, isn't it?

A. Yes, sir, that is right. That is the price we generally price flush production on.

Q. This was flush production on it?

A. Yes, sir, but it wasn't worth $8,000,000.00."

It was here agreed by counsel for plaintiff and counsel for defendant that the adjudication in bankruptcy of Harry Morris Guaranteed Gusher Syndicate No. 3 and Harry Morris, Trustee, was had December 24, 1923, and that the petition in bankruptcy was filed November 23, 1923.

(At this point the defendant introduced in evidence certified copy of the record of the case entitled John H. Page, Trustee for Mike Lyvers Syndicate, Plaintiff, vs. Natural Gas & Fuel Corporation, Defendant, in Equity, in the District

Court of the United States for the Western Division of the Eastern District of Arkansas. The certified transcript shows that a bill in equity identical in all of its allegations,
214 and in its prayer with the complaint in this cause, was filed by John H. Page, trustee for Mike Lyvers Syndicate, as plaintiff against the Natural Gas & Fuel Corporation as defendant on January 9, 1926, the complaint being signed by Robert C. Knox and Frank J. Looney as attorneys for the plaintiff; that a motion to quash and set aside service was filed on behalf of the defendant on January 15, 1926; the substance of the motion being a prayer that service of summons be quashed for the reason that the defendant is a Delaware corporation, that it has never participated in the transaction of business in the Eastern District of Arkansas, all of its activities having been performed wholly within the Western District of said state; by reason of which facts no legal service can be had or has ever been had in the Eastern District of Arkansas.

That on June 12, 1926, an amended motion to quash summons and set aside service, and motion to dismiss for lack of jurisdiction was filed on behalf of the defendant. The amended motion set out in more elaborate detail the grounds urged in the original motion to quash.

That on April 18, 1927, the motion to quash came on to be heard and that it was in all things granted, and that the service of summons was quashed.

Plaintiff's Rebuttal Evidence.

W. F. BABB—(Who was previously sworn).

Identify the following checks: Voucher check purporting to be No. 2, dated February 28, 1923, drawn by Mike Lyvers Syndicate, Mike Lyvers Trustee, to the order of Bender Supply Company for $5000.00, for an item on account
215 of Morris Drilling Company. The check was signed by D. A. Morris for the Syndicate.

Voucher check No. 8, dated March 13, 1923, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by Otto L. Morris, payable to First National Bank, for $6250.00, the voucher reading "for 12 acre lease 10-16-15". It appears to have been paid on March 15, 1923.

Voucher check No. 10, dated March 15, 1923, payable to Guaranteed Gusher Syndicate No. 3, for $425.00, signed Mike

Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher containing the notation "to 1/3 of March, first half of March office salary, paid by Guaranteed Gusher Syndicate No. 3."

Mike Lyvers Syndicate voucher check No. 37, dated April 16, 1922, payable to First National Bank, for $851.75, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher bearing notation "portion of salary for first half of April, 1923, paid by Guaranteed Gusher Syndicate No. 3". The date is evidently wrong, and it should be dated April 16, 1923. It was paid April 18, 1923.

Mike Lyvers Syndicate voucher No. 44, dated April 27, 1922, payable to First National Bank, for $175.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher bearing the notation "for newspapers and postage paid to Moore Advertising Company by G. G. No. 3, Mike Lyvers Syndicate proportion being $175.00". This check was paid by us on April 30, 1923.

Voucher check of Mike Lyvers Syndicate No. 53, dated May 22, 1922, to First National Bank, for $625.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the notation on the voucher reading "to Mike Lyvers proportion as paid by G. G. No. 3 for salaries, last half". This check was paid by us May 3, 1923.

Voucher check No. 54, Mike Lyvers Syndicate, dated May 6, 1923, payable to First National Bank, for $100.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher bearing the notation "for Smith's printing, April account, paid by G. G. No. 3 less G. G. No. 3 proportion, $387.70, less G. G. No. 3 proportion $287.70, Mike Lyvers proportion $100." This check appears to have been paid May 8, 1923.

Mike Lyvers Syndicate voucher No. 55, dated May 14, 1923, payable to Morris Drilling Company for $10,000.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher notation reading "to lease equipment expense of two wells in Section 33, paid by Morris Drilling Company, $10,000,000."

216 This check appears to have been paid by us May 15, 1923.

Mike Lyvers Syndicate check No. 57, dated May 15, 1923, payable to Morris Drilling Company, for $3500.00, signed

Mike Lyvers Syndicate, Mike Lyvers Trustee, by Otto L. Morris, voucher notation being "to expense and lease equipment paid for, for Mike Lyvers Syndicate, by Morris Drilling Company, $3500.00". This check appears to have been paid by us on May 16, 1923.

Voucher check No. 58, Mike Lyvers Syndicate, dated May 17, 1923, payable to First National Bank, for $1000.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by Otto L. Morris, the voucher notation being "for pits and tanks, paid by G. G. No. 3, Section 33-15-16, $1000.00". This check appears to have been paid by us May 19, 1923.

Mike Lyvers Syndicate check, dated April 4, 1923, payable to Continental Supply Company, for $2107.60, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, voucher notation being "April 24, 1923, 1916 feet of 6-inch casing, $2107.60". This check appears to have been paid by us on May 14, 1923, after first being turned down for insufficient funds.

Voucher check No. 60, dated May 24, 1923, payable to Guaranteed Gusher Syndicate No. 3, for $780.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, notation being "to pits and tanks and standardization of wells in Section 33, paid by G. G. No. 3, $780.00". This check appears to have been paid by us on May 26, 1923.

Voucher check No. 61, dated June 9, 1923, payable to S. R. Woodley, for $300.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, voucher notation being "to labor, standard rig, $300.00". This check appears to have been paid by us on June 9, 1923.

Voucher check No. 62, payable to Guaranteed Gusher Syndicate No. 3, for $252.85, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris; voucher notation being "to labor and standard rigs, by S. R. Woodlay men, paid by Guaranteed Gusher No. 3". This check appears to have ben paid by us June 11, 1923.

Voucher check No. 63, dated June 19, 1923, payable to Guaranteed Gusher Syndicate No. 3, for $1300.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, voucher notation being "to payment on pits and tanks purchased from Cypress Tank Company and paid by G. G. No. 3, $1300.00". This check appears to have been paid by us on June 26, 1923.

217 Voucher check No. 65, dated June [Q1,] 1923, payable to the order of Guaranteed Gusher No. 3, $800.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, the voucher notation being "to payment of pits and tanks purchased from Cypress Tank Company and paid by G. G. No. 3, for Mike Lyvers Syndicate, $800.00". This check appears to have been paid by us June 22, 1923.

Voucher check No. 65, dated June 29, 1923, payable to Morris Drilling Company, for $800.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, voucher notation being "to standardization of Johnette No. 3 well, part payment". This check appears to have been paid by us on June 30, 1923.

Voucher check No. 68, dated July 20, 1923, payable to First National Bank, for $400.00, signed Mike Lyvers Syndicate, Mike Lyvers Trustee, by D. A. Morris, voucher notation being "operating expense for July, first half, paid by G. G. No. 3". This check appears to have been paid by us July 21, 1923.

(All of the above checks were introduced in evidence as exhibits.)

(Approval of Statement of Evidence by District Judge.)

The foregoing narrative of the evidence in the above entitled cause is complete and correct and is hereby approved.

FRANK A. YOUMANS,
Judge.

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218 Order for Transmittal of Six Original Maps With Transcript, and for Abbreviation of Exhibit "H" to Complaint.

Entered in U. S. District Court January 6, 1931.

John H. Page, Trustee, Plaintiff,
No. 47 vs Equity.
Arkansas Natural Gas Corporation, Defendant.

On application of both parties, plaintiff and defendant, it is hereby ordered that in the making of the transcript of the record to be forwarded to the clerk of the Circuit Court of Appeals for the Eighth Circuit upon appeal of this case, the Clerk of this court attach to said transcript and transmit therewith to the clerk of said Circuit Court of Appeals, all of the original maps which were introduced in evidence as

exhibits to the testimony of Howard A. Matthews, there being six maps so introduced.

It is further ordered that the clerk of this court in making up the said transcript copy and include therein in full all of the exhibits to the pleadings, with the exception of Exhibit H to the complaint, which said Exhibit H shall be incorporated in said transcript in the condensed form submitted by plaintiff, which said form is hereby approved.

This January 6, 1931.

FRANK A. YOUMANS,
Judge.

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219 (Petition for Appeal and Allowance Thereof.)

Filed in U. S. District Court December 24, 1930.)

To the Honorable Frank A. Youmans, Judge of the District Court of the United States for the Western District of Arkansas, El Dorado Division:

Now into court comes John H. Page, Trustee for Mike Lyvers Syndicate, plaintiff in the above numbered and entitled cause, and with respect represents:

That on December 17, 1930, this Honorable Court rendered a judgment against the plaintiff, John H. Page, Trustee for Mike Lyvers Syndicate, and in favor of the defendant, Arkansas Natural Gas Corporation, dismissing the plaintiff's bill of complaint for want of equity, and the above named plaintiff, John H. Page, Trustee for Mike Lyvers Syndicate, feeling himself aggrieved by the decree made and entered in this case, does hereby appeal from the said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that his appeal be allowed; that citation issue as provided by law, and that transcript of the record, proceedings and papers on which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit. And your petitioner further prays that the court grant the proper order fixing the security to be given to perfect this appeal.

JORDAN SELLERS,
PAT McNALLEY,
FRANK J. LOONEY,
YANDELL BOATNER,
J. M. GRIMMET,
Attorneys for Plaintiff.

Order.

Let the foregoing petition be granted, and the appeal
220 is allowed upon plaintiff giving bond, conditioned as required by law, in the sum of $250.00 for costs only.

This done and signed on this 24th day of December, 1930.

FRANK A. YOUMANS,
Judge, United States District Court,
for the Western District of Arkansas.

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221 Assignment of Errors.

Filed in U. S. District Court December 24, 1930.

Now comes John H. Page, Trustee for Mike Lyvers Syndicate, by his solicitors, McNally & Sellers, Pugh, Grimmet & Boatner and Frank J. Looney, and shows that the decree entered in the above numbered and entitled cause on the 17th day of December, 1930, is erroneous, unjust and prejudicial to the plaintiff, and in connection with his petition for appeal makes the following assignment of errors, to-wit:

I.

The court erred in its interpretation and application of the decision of the Circuit Court of Appeals for the Eighth Circuit rendered in this cause on appeal from a judgment of the District Court sustaining a motion to dismiss and reversing the lower court and remanding same for trial consistent with the opinion, the said case being No. 8,299 on the docket of said Circuit Court of Appeals.

II.

That the court erred in holding on the facts found that material evidence was introduced at the trial of this case by defendant contradicting or changing the situation as disclosed by the record on which the court of appeal rendered its former opinion herein.

III.

The court erred in holding that the Referee had jurisdiction in bankruptcy of a plenary action and the right of determining title to property which was vested in Mike Lyvers Syndicate, a trust estate, where Mike Lyvers, individually, petitioned the Referee that a sale of said property be
222 not made and where the trustee in bankruptcy set up title, and thereupon Mike Lyvers sought by appro-

priate motion to withdraw from the case, and erred in holding Mike Lyvers consented thereto.

IV.

The court erred in holding that Mike Lyvers, who filed the petition as above stated, as an individual opposing the sale of certain oil and gas leases, appeared as Mike Lyvers, Trustee of Mike Lyvers Syndicate, and that judgment was rendered against said Syndicate in such proceeding.

V.

The court erred in finding and holding that Mike Lyvers consented to the aforesaid proceedings before the Referee resulting in the order of date 6th March, 1924, requiring said Mike Lyvers to execute unto the Trustee in Bankruptcy a quit claim deed to the property here involved, and other property.

VI.

The court erred in holding that H. M. Barney, Trustee in bankruptcy of Harry Morris Guaranteed Gusher Syndicate No. 3, had possession of the undeveloped mineral lease involved in this litigation, of which record title was in Mike Lyvers Syndicate, a trust estate not in bankruptcy.

VII.

The court erred in finding and holding that Mike Lyvers Syndicate was at any time before the Referee in Bankruptcy in the aforesaid proceedings leading up to the order of the referee of date March 6th, 1924, requiring Mike Lyvers to execute a quit claim deed unto the trustee in bankruptcy, and that such order and its affirmance constitutes res adjudicata as to the rights of plaintiff herein.

223 VIII.

The court erred in holding that Barney, Trustee in Bankruptcy of Harry Morris Guaranteed Gusher Syndicate No. 3 acquired title to the property involved in this action by quit claim deeds executed pursuant to said order of the Referee.

IX.

The court erred in not finding and holding that title to the Bilyou lease, which the court found was in Mike Lyvers Syndicate, had never been divested.

X.

The court erred in holding res adjudicata the order of dismissal made by G. G. Pope, Referee in Bankruptcy, ren-

dered in a proceeding taken on March 18, 1925, before him in the matter of Harpy Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, by one Zug, et al., claiming to be unit holders of Mike Lyvers Syndicate, opposing the sale of the property here involved and other properties, which sale was made by H. M. Barney, Trustee of said bankrupt, to this defendant as per act of sale executed March 2, 1925, pursuant to their contract of sale of date January 23, 1925, approved by said Referee on same date.

XI.

The court erred in failing to find and hold that the Referee was without jurisdiction of the Zug petition above referred to.

XII.

The court erred in sustaining the defense of laches.

XIII.

The court erred in holding upon the facts found that laches applied while Mike Lyvers was trustee of Mike Lyvers Syndicate, and that laches applied under the facts found against John H. Page, trustee.

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XIV.

The court erred in not finding that the purchaser undertook and carried on development on the Bilyeu lease with the knowledge that it had not good title thereto.

XV.

The court erred in finding that the Unitholders of Mike Lyvers Syndicate had notice of the proceedings leading up to the sale of March 2nd, 1925, by Barney, Trustee, to defendant, and of such sale, and that laches applied to them.

XVI.

The court erred in rejecting plaintiff's offer of evidence of an opposition by H. G. Miller and Knapp Engineering Company to sale of March 2nd, 1925, which opposition was filed March 6, 1925, and which same were pending and tried on March 18th, 1925, and subsequently thereto petition for review was filed and was pending when the defendants began and continued drilling on the property in contest, which same was offered for the purpose of showing that the defendant had notice of opposition to the sale and did not desist in any way from drilling upon this property.

XVII.

That the court erred in admitting testimony of Pope, Referee, in Bankruptcy, that he administered on Mike Lyvers Syndicate property in the bankruptcy of Harry Morris Guaranteed Gusher Syndicate No. 3, over plaintiff's objection that the order of reference was the best evidence as to what was subject to administration.

XVIII.

That the court erred in finding the issues in favor of the defendant and dismissing the bill herein for want of equity on the facts found.

Wherefore, plaintiff prays that these assignments of errors be maintained and that the decree of the District Court be reversed, annulled and set aside, and that there be judgment herein in favor of the plaintiff as prayed for in
225 his bill of complaint, and that proper decree be entered accordingly.

JORDAN SELLERS,
PAT McNALLEY,
FRANK J. LOONEY,
YANDELL BOATNER,
J. M. GRIMMET,
Solicitors for Plaintiff.

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226 Bond On Appeal.

Filed in U. S. District Court Jan. 7, 1931.

Know All Men By These Presents:

That we, John H. Page, Trustee of Mike Lyvers Syndicate, as principal, and C. C. Calvert as sureties, are held and firmly bound unto Arkansas Natural Gas Corporation in the sum of $250.00, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 31st day of December, 1930.

Whereas the above named John H. Page, Trustee of the Mike Lyvers Syndicate, has prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the judgment of the United States District Court for the Western District of Arkansas, El Dorado Division in the above entitled cause:

Now, therefore, the condition of this obligation is such that if the above named John H. Page, Trustee, shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN H. PAGE,
Trustee, Mike Lyvers Syndicate,
Principal.

C. C. CALVERT, Surety.

Approved:

FRANK A. YOUMANS, Judge.

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227 Praecipe for Transcript, with Return of Service.

Filed in U. S. District Court Dec. 31, 1930.

To the Honorable Judge of the District Court of the United States for the Western District of Arkansas, El Dorado Division:

The Clerk will please proceed to make up the transcript in the above numbered and entitled cause and include in same the following:

1. Bill of complaint.
2. Exhibits attached to complaint.
3. Answer of defendant.
4. Exhibits attached to answer.
5. Motion to strike parts of answer.
6. Judgment on motion to strike.
7. Opinion of Court and findings.
8. Decree.
9. Petition for appeal and order allowing same.
10. Citation of appeal.
11. Return showing service of above.
12. Assignment of errors.
13. Appeal bond.
14. All evidence narrative and other evidence.

15. Approval of Court and directions.

16. This praecipe and return showing service on appellee.

17. Minutes of Court.

18. Clerk's certificate.

JORDAN SELLERS,
PAT McNALLY,
J. M. GRIMMET,
YANDELL BOATNER,
FRANK J. LOONEY,
Solicitors for Plaintiff.

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228 Received this writ at Little Rock, Arkansas, December 29, 1930, and executed same on Moore, Gray & Burrow, by delivering a true and correct copy of the writ, it being a praecipe to Clifton W. Gray, he being a member of firm, Little Rock, Arkansas. This 29th day of December, 1930.

G. L. MALLORY,
U. S. Marshal, Eastern District of Arkansas.

By W. F. FREEMAN,
Deputy U. S. Marshal.

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229 (Clerk's Certificate to Transcript)

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages to be and constitute a true and correct copy of the record, assignment of errors, and all proceedings in the case of John H. Page, Trustee for Mike Lyvers Syndicate, Plaintiff, vs. Arkansas Natural Gas Corporation, Defendant, No. 47 In Equity, in accordance with the praecipe of counsel, as the some appear on file and of record in my office as such clerk in the El Dorado Division of said District.

Citation, with acceptance of service is annexed and transmitted herewith.

Seal
U. S. Dist. Court,
West. Dist. of Ark.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at my office in the City of Fort Smith, Arkansas, this 9th day of January, 1931.

WM. S. WELLSHEAR,
Clerk.

Filed Jan 10 1931 E. E. Koch Clerk.

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199 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

John H. Page, Trustee, etc., Appellant,
No. 9102. vs.
Arkansas Natural Gas Corporation.

The Clerk will enter my appearance as Counsel for the Appellant.

PAT McNALLEY,
El Dorado, Ark.

JORDAN SELLERS,
El Dorado, Ark.

FRANK J. LOONEY,
Shreveport, La.

J. M. GRIMMET,
Shreveport, La.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 19, 1931.

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200 (Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

W. M. PHILLIPS,
City Bank Bldg.,
Shreveport, La.

FRANK H. BACON,
Ardia Bldg.,
Shreveport, La.

JOHN MERRICK MOORE,
Boyle Bldg.,
Little Rock, Ark.

CLIFTON W. GRAY,
Boyle Bldg.,
Little Rock.

JEFF DAVIS,
Exchange Bldg.,
El Dorado, Ark.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 22, 1931.

(Order of Submission.)

May Term, 1931.

Wednesday, May 20, 1931.

This cause having been called for hearing in its regular order, argument was commenced by Mr. F. J. Looney for appellant, continued by Mr. Jeff Davis and Mr. J. Merrick Moore for appellee, and concluded by Mr. J. M. Grimmet for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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201 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 9102.—October Term, A. D. 1931.

John H. Page, Trustee, etc., Appellant, vs. Arkansas Natural Gas Corporation, Appellee.	Appeal from the District Court of the United States for the Western District of Arkansas.

Mr. F. J. Looney and Mr. J. M. Grimmet (Mr. Jordan Sellers, Mr. Yandell Boatner, Messrs. McNalley & Sellers and Messrs. Pugh, Grimmet & Boatner were with them on the brief), for appellant.

Mr. Jeff Davis and Mr. J. Merrick Moore (Mr. C. W. Gray and Messrs. Frueauff, Robinson & Sloan were with them on the brief), for appellee.

Before Kenyon and Booth, Circuit Judges, and Dewey, District Judge.

Kenyon, Circuit Judge, delivered the opinion of the court.

This suit, brought in a State Court of Arkansas and removed to the Federal Court, is one in which appellant, Trustee of the Mike

Lyvers Syndicate (herein called the Lyvers Syndicate) seeks a decree that the Arkansas Natural Gas Corporation, et al., successor in interest to the Natural Gas and Petroleum Corporation, holds in trust for appellant, as Trustee, a certain gas and oil lease on what is known as the Bilyou (or Bilyeu) tract, viz: the Northwest Quarter of the Northwest Quarter of Section 9, Township 16, South, Range 15, Union County, Arkansas. The Lyvers Syndicate was organized under the laws of Arkansas February 21, 1923, by a Declaration of Trust, in which Mike Lyvers was appointed Trustee, with almost unlimited powers as to the management of the trust and its properties. Beneficial interests in the trust, to the extent of 14,400 units were sold all over the United States at the price of $10.00 per unit. The lease in question is one made in 1922 by J. A. Bilyou and wife to one Olvey, assigned by him to one Murphy and by Murphy to Otto L. Morris, who made two assignments thereof to Mike Lyvers, Trustee of the Mike Lyvers estate, which together covered the entire lease. The lease was encumbered by an agreement between Morris and his assignor, Murphy, by the terms of which Murphy was to have some $32,000.00 out of the first oil and gas produced from the lease. At the time of organization of the Lyvers Syndicate there existed an organization with the impressive title, "Harry Morris Guaranteed Gusher Syndicate No. 3," (hereinafter termed the Gusher Syndicate), which had been promoted by Harry N. David, and Otto Morris, who were also the promoters of the Mike Lyvers Syndicate. These two syndicates worked together, somewhat interrupted by various events, one being an indictment on September 13, 1923, of Mike Lyvers, Harry and Otto Morris, for conspiring to defraud the unit holders of the Mike Lyvers Syndicate, and for using the United States mails to carry out the same. On August 28, 1923, the Gusher Syndicate was placed in the hands of a Receiver in the State Court, and one Williford was appointed Receiver. He endeavored to find the books of this and other syndicates controlled by the Morrises, but was unsuccessful, they having been removed from the offices the previous day. Williford demanded from Lyvers the property of the Lyvers Syndicate, and some of it was conveyed to him by Lyvers. Certain of the Unit holders learning of Williford's plans to sell the property of the Lyvers Syndicate formed a Reorganization Committee, which engaged one Dr. McComb to act for them, who with other members of this Committee filed an involuntary petition in bankruptcy against the Gusher Syndicate, and it was adjudged a bankrupt December 24, 1923. Harry N. Morris was adjudged a bank-

rupt thereafter. Both proceedings were referred to one Pope, Referee in Bankruptcy. H. M. Barney, who had in November, 1923, been Receiver of the Gusher Syndicate, was in January, 1924, made Trustee in Bankruptcy. He had as Receiver obtained possession of all the property of the Gusher Syndicate by the aid of the Federal Court. He was as unsuccessful as Williford in finding the books of the Mike Lyvers Syndicate, the Gusher Syndicate or the Morris Drilling Company, which was another concern controlled by the Morrises and operating out of the same offices. Barney took actual possession of the various properties of the Gusher Syndicate and the producing leases of the Lyvers Syndicate, and as to the Bilyou Lease, he put up placards on the property stating that it was in his possession as Receiver of the Federal Court. He continued to hold this possession of all of these properties as property of the bankrupt until they were sold by him as Trustee in March, 1925. In May, 1924, he paid the annual rental due on the Bilyou Lease in the sum of $40.00. The Reorganization Committee under Dr. McComb became active after the adjudication of the Gusher Company as a bankrupt. A plan was formulated to organize a new corporation to purchase the properties held by the Trustee in Bankruptcy. Meetings of unit holders of the Lyvers Syndicate were held throughout the United States, at which they were informed that the properties of the Lyvers Syndicate had been taken over by the Trustee in Bankruptcy of the Gusher Syndicate. In January, 1924, the Reorganization Committee mailed to the unit holders a form of proof of claim in bankruptcy to be used by them in filing their claims as creditors in the matter of the Gusher Syndicate and Harry Morris, Bankrupts. This Committee organized the Moco Oil Corporation, the purpose of which was to acquire the Morris properties. The unit holders were constantly advised of the situation by the publication and distribution of a paper called "The Moco News." In one copy it listed properties which the Moco Oil Corporation intended to buy from the Trustee in Bankruptcy, and this list included the Bilyou Lease. In February, 1924, Mike Lyvers filed an intervention before the Referee in Bankruptcy claiming certain property taken by the Trustee in Bankruptcy, among which was the Bilyou Lease. February 15, 1924, the Trustee filed response, admitting possession of the property, and claiming it as Trustee in Bankruptcy, and denying ownership in Lyvers, and asking for a summary order directing Lyvers to execute a quit claim deed conveying certain leases of the Lyvers Syndicate to him as Trustee, alleging that said leases were purchased with moneys and assets of the bankrupt estate, and

that they were held by Lyvers only as Trustee for the benefit of said estate. The matter was heard by the Referee, who held that Lyvers had no interest in this property and that all the property of the Gusher Syndicate and the Lyvers Syndicate belonged to a common fund. The District Court affirmed the order of the Referee requiring Lyvers to convey the property in question to Barney, Trustee, and on October 13, 1924, Lyvers personally and as Trustee of the Lyvers Syndicate conveyed the same, which included the Bilyou Lease, to Barney as Trustee. The property in the Bilyou Lease was erroneously described in the deed, but was afterwards corrected by a second quit claim deed by Lyvers as Trustee of the Syndicate to Barney, Trustee in Bankruptcy. In October, 1924, the Referee in Bankruptcy mailed to the unit holders of the Lyvers Syndicate a notification to file their claims in bankruptcy as creditors of the estate, and the unit holders, representing more than ten thousand units, filed claims in the Gusher Syndicate bankruptcy proceeding. These claims were allowed and a dividend of two and one-half cents per unit was paid. January 23, 1925, Barney as Trustee in Bankruptcy, made a contract with the Natural Gas and Petroleum Corporation to sell to it the properties remaining in his hands for $125,000.00. This was approved by the Referee and duly recorded. At that time the Bilyou Lease was unexplored. It was difficult to sell it separately because of the $32,000.00 oil payment to Murphy standing against it. The best offer which the Referee had received was $100,000.00, and he had been authorized by the Trustee to accept this. About a week after the contract between Barney as Trustee and the Natural Gas and Petroleum Corporation was made McComb caused a petition to be filed by the Moco Oil Corporation, in which it was alleged that it was willing to pay $155,000.00 for the properties. This attempt does not seem to have borne fruit or to have been seriously considered. After this the Natural Gas and Petroleum Corporation took over and operated the properties embraced in the contract. A deed of assignment of all these properties carrying out the contract of January 23, 1925, was executed by Barney as Trustee to the Natural Gas and Petroleum Corporation on March 2, 1925, and the balance of purchase money was paid. The Bilyou Lease was included in the properties conveyed. March 12, 1925, the purchaser entered on the Bilyou Lease and drilled a gas well. As oil wells were drilled in the vicinity the value of the lease increased and on March 12, 1925, it had a value of $6,000.00 above the $32,000.00 against it. The Natural Gas and Petroleum Corporation in buying these properties relied on

its attorney's opinion as to title and assumed that it had a valid title. March 18, 1925, a petition was filed before Pope, Referee, by unit holders, Zug, Wilson and Turner, alleging they filed it for all unit holders as a class proceeding, and asking that the sale of the Bilyou Lease be set aside on the ground that it was in fact the property of the Mike Lyvers Syndicate and not the property of the Gusher Syndicate or Harry N. Morris, Bankrupts. Response was filed by the Trustee, and the petition was denied. No review by the District Court was ever asked. The Bilyou Lease continued to be developed by the purchaser, and a number of wells were drilled. The peak of production was reached on May 10, 1925, when the lease was producing 40,000 barrels of oil per day of twenty-four hours, and the gas well was producing much gas. The Bilyou Lease had come into its own, and was of great value, estimated as of May 10, 1925, to be $600,000.00 to $800,000.00. In its development the purchaser paid for the period from March 1, 1925, to January 1, 1928, a total of $221,554.33. Under the terms of the trust Lyvers could choose his successor. It was natural that McComb and others having the welfare of the unit holders at heart should desire a new trustee, as according to Williford's testimony Lyvers "seemed more worried about keeping out of the penitentiary than anything else." Lyvers would not appoint McComb as his successor, but did appoint John H. Page, appellant here, who filed suit against the Natural Gas & Fuel Company, successor of the Natural Gas and Petroleum Corporation, in the District Court of the Eastern District of Arkansas, which suit was similar to the one at bar. Judge Trieber dismissed it on April 18, 1927, for lack of jurisdiction. December 20, 1927, this suit was brought against the Natural Gas and Fuel Corporation in the State Court and removed to the United States District Court. The trial Court dismissed the bill for failure to set up a cause of action. The case was appealed to this Court and the decree of the District Court was reversed and the case remanded. (*Page, et al.*, v. *Natural Gas & Fuel Co.*, 35 F. (2d) 462). Appellee having succeeded to the rights of the Natural Gas & Fuel Company was substituted as defendant and filed answer pleading many defenses. The trial Court at the present trial rendered an extended opinion dealing with every phase of the case and made certain findings of fact and conclusions of law. It held that the previous decision of this Court was not binding on certain points as there was voluminous evidence introduced not in the prior hearing. The Court concluded that the order on Lyvers to convey the Bilyou Lease to the Trustee and the deed carrying out

the order vested title in Barney as Trustee, from whom title passed to the predecessor of appellee, and that the question of title was res adjudicata. Further, that the order of the Referee on the petion of Zug et al., was res adjudicata on the question of title and that laches would prevent plaintiff from recovering. The suit was dismissed for want of equity.

We have tried to make as brief a statement of the important facts as is compatible with a fair understanding of a very complicated and involved situation.

We shall not discuss the question as to whether the petition of intervention filed by Zug et al. and the proceedings thereon amounted, as found by the trial Court, to res adjudicata on the question of title to the Bilyou Lease, nor shall we place our decision upon the ground of laches, which defense was sustained by the District Court. This Court has taken the position that where the subject of controversy is mining and oil property the doctrine of laches should be rigidly enforced if necessary to prevent injustice, *Taylor* v. *Salt Creek Co.*, 285 F. 532, and the Supreme Court has indicated in *Patterson* v. *Hewitt*, 195 U. S. 309, that there is no class of cases in which the doctrine has been more relentlessly enforced, yet we have doubt as to whether it should be applied in this case where delays were to a large extent caused by a faithless Trustee failing to take action to correct his own wrongful conduct. *Willard* v. *Campbell, et al.*, 248 Pac. 219. As the trial Court's decision must be upheld on the ground that the intervention of Lyvers in the bankruptcy proceeding, and the action of the Referee and Court thereon, constituted res adjudicata as to the ownership of the Bilyou Lease, there is no need of deciding the question of laches. We are of the opinion also that the Gusher Syndicate and the Lyvers Syndicate were completely merged prior to bankruptcy, and that the leases secured by the Lyvers' Syndicate passed as a matter of law to the Trustee in Bankruptcy of the Gusher Syndicate.

Are we foreclosed from considering these questions by the prior decision of this Court?

The rule of "the law of the case" is of course recognized by this Court. The theory is that what has once been determined should not be reopened, well expressed by Mr. Justice Holmes in *Messinger* v. *Anderson*, 225 U. S. 436, "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely

expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *City and County of Denver* v. *Denver Tramway Corp.*, 23 F. (2d) 287; *Federal Reserve Bank of Kansas City, Mo.*, v. *Omaha Nat. Bank*, 45 F. (2d) 511; *Dodd* v. *Union Indemnity Co.*, 32 F. (2d) 512.

In the former trial the complaint was dismissed upon motion for the reason that it did not state a cause of action. The truth of the allegations was therefore admitted for the purposes of the motion. This Court in its opinion was considering whether the complaint stated a cause of action. No evidence was introduced in the first trial unless the exhibits to the complaint could be considered as such. The complaint did not show that Lyvers was appearing in the intervention in any but his individual capacity. Therefore the Court held the order adjudicating title against him did not bind him as trustee. The evidence introduced on the present trial shows that Lyvers never held the property in question as an individual or in any capacity except as trustee. It throws a different light on his appearance in the intervention proceeding. At the present trial the response and the petition for summary order filed in the intervention was introduced. That was not in the former trial. The District Court in its opinion stated, "It appears from the testimony that the only title that Lyvers had was that acquired through two conveyances to him by Otto L. Morris." Further, "The testimony clearly shows that Barney as Trustee in Bankruptcy had no possession of any property belonging to Mike Lyvers individually." These statements are justified by the evidence. It is apparent that the evidence introduced here makes a case materially different from that appearing on the face of the complaint, therefore as to the questions we propose to discuss we are in our judgment not bound by the former decision. *Meyer & Chapman State Bank* v. *First Nat. Bank of Cody*, 291 F. 42. It is to be noted also that the former opinion passes the question of the jurisdiction of the Referee to make the summary order on Lyvers, which would leave in any event that question and the legitimate conclusions which should follow its solution entirely open to this Court.

Was the intervention by Lyvers in the bankruptcy proceeding and the determination by the Referee in Bankruptcy and the District Court as to the ownership of the lease in question res adjudicata as to such issue involved in this case?

In February, 1924, Mike Lyvers filed in the matter of the bankruptcy proceeding of the Guaranteed Gusher Syndicate No. 3, Har-

ry Morris, Trustee, a petition asking that the Trustee be ordered by the Court or the Referee not to sell any of the properties claimed in said petition. He asserted therein that Barney, Trustee of the bankrupt estate, had taken possession of and was claiming certain individual property of said Mike Lyvers as property of the bankrupt estate. A lease of all properties claimed by Lyvers was attached as Exhibit "A", which Exhibit covers the lease known as the Bilyou Lease in controversy here, and said Exhibit also recites, "And any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers, Trustee in Union and Ouachita Counties, Arkansas."

Barney, Trustee, filed response to the intervention of Lyvers, denying that Lyvers was the owner of the oil and gas leases or had any interest therein whatsoever. He also filed a petition for an order requiring Lyvers to execute a quit claim deed to the Trustee of the bankrupt estate conveying certain oil and gas leases, among them the Bilyou Lease, and alleged:

"That said oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate, and that said leases were taken in the name of Mike Lyvers, but that the said Mike Lyvers only took and held as trustee for the benefit of said trust estate, the bankrupt herein.

"That the said Mike Lyvers did not pay out and had no funds with which to pay for said lease, but that he at said times was in the employ of Harry Morris as trustee under the declaration of trust of the assets of this bankrupt estate, and that in placing and taking said leases in the name of said Mike Lyvers that the same was done under a breach of trust of said Harry N. Morris under his declaration of trust agreement. That the said Mike Lyvers does not now and has not at any time owned any interest in said leases, and that your trustee is entitled to an order out of this court, directing him to execute a quit claim deed to said leases to said trustee in bankruptcy, a copy of which deed is hereto attached and submitted to this court for its approval.

* * * * * * * * * * *

"That the said Mike Lyvers had filed an intervention herein for said oil and gas leases and has voluntarily submitted himself to the jurisdiction of this court, and is now subject to the orders of this court."

The Referee in Bankruptcy held that title to the properties claimed by Lyvers and Otto L. Morris had vested in the Trustee in

Bankruptcy; and Lyvers was ordered to execute conveyances transferring the legal title to the properties held by him as set forth in the petition of intervention of the trustee in bankruptcy, H. M. Barney. The Referee in his order said:

"All of the property claimed by the interveners was purchased with the funds of the bankrupt, derived from the sale of units in the trust estate of Harry Morris Guaranteed Gusher Syndicate No. 3, the bankrupt herein, and that the title to the various properties, including the property intervened for and more particularly set out in the various assignments introduced in evidence, was taken in the name of Mike Lyvers, and Otto L. Morris, and also in the name of Mike Lyvers, Trustee in Bankruptcy herein. All of said property was merely held by said parties for the benefit of the bankrupt and they had no interest in same otherwise. They not only handled these properties in this manner but handled other properties in like manner and in the name of various syndicates for their own convenience. All of the properties belonged to a common fund, although badly commingled and hard to trace owing to the absence of the books of the various syndicates including those of the bankrupt; and also because the interveners have failed and refused to appear before the referee and testify."

The order of the Referee was affirmed by the trial Court, which found that the Referee had jurisdiction to make an order upon Mike Lyvers to transfer the property held by him and described in his petition of intervention.

October 13, 1924, Mike Lyvers, for himself, for the Mike Lyvers Syndicate, and for Mike Lyvers, Trustee, made a quit claim deed to Barney, Trustee in Bankruptcy, of the Gusher Syndicate, which covered the Bilyou Lease, and which recited that it was his "intention to convey all interest appearing in my name, individually and as trustee of the Mike Lyvers Syndicate, and as Mike Lyvers, trustee, wherever situated," etc., and "that all properties appearing in my name in the State of Arkansas, were in truth and in fact purchased with the funds of the Harry Morris Guaranteed Gusher Syndicate No. 3, and said properties were placed in my name for convenience only, and are in truth and in fact the properties of the Harry Morris Guaranteed Gusher Syndicate No. 3."

Appellant claims that this conveyance was a voluntary act, and that Lyvers could not give away property held by him as trustee. It does not seem to have been a voluntary act. The Court's order

was in part as follows: "The court finds as a matter of law that the said Referee did have such jurisdiction. It is therefore by the court considered, ordered and adjudged that the order of the Referee requiring Mike Lyvers to convey to H. M. Barney, Trustee of the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, by a quit claim deed for all of the property described in the intervention of said Mike Lyvers be affirmed." In making the quit claim deed Lyvers was merely carrying out the order of the Referee and the Court. Later a quit claim deed was executed to cover a mistake of description in the first deed.

Was there jurisdiction in the Referee and the District Court to make the orders on Lyvers to transfer the property described in the petition of intervention to the Trustee in Bankruptcy of the Gusher Syndicate? Could the question of title to the leases be determined in a summary proceeding in a bankruptcy court, or must it be by a plenary suit?

The significance of possession with reference to jurisdiction in a bankruptcy court to determine questions of title by summary, as distinguished from plenary, proceedings has received much attention by the courts and textbook writers. 5 Remington on Bankruptcy, (3d Ed.) section 2365, p. 448, says, "So far as concerns personal jurisdiction over the bankrupt, the bankruptcy court, as we have already seen, assumes jurisdiction by the filing of the bankruptcy petition. So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of the bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or by the bankrupt or his agents, or by someone not claiming beneficial interest (as, for example, custodians and court officers holding under nullified liens by legal proceedings, etc.) constitutes 'custodia legis' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property', and the property comes into its 'custodia legis', if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy, or of the trustee, marshal, referee, bankrupt, bankrupt's agent, or of someone not claiming beneficial interest, such as custodians or court officers under nullified liens by legal proceedings." In *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, the Court says: "But where the property in dispute is in the actual possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, Federal or State. Where a court of competent jurisdiction

has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, although it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them." In *Emerson* v. *Castor*, 236 F. 29, 37, the Court says: "When, therefore, an ancillary tribunal takes possession, whether with or without opposition, such possession draws to that tribunal power, indeed, imposes a duty, to determine all questions of priorities and liens affecting the property." *In re Hoover-McClintlock Motor Car Co.*, 1 F. (2d) 660, 661, it was said: "Possession of any material part of the res gave the referee jurisdiction to determine the validity of the deed of trust affecting such property." *In re Rathman*, 183 F. 913, this Court said, "The jurisdiction of the bankruptcy court to determine in a summary proceeding adverse claims created before the filing of the petition in bankruptcy to liens upon and titles to property claimed by the trustee as that of the bankrupt is conditioned and limited by its actual possession thereof." *In re Rochford et al.*, 124 F. 182, this Court had before it the question of jurisdiction of the District Court sitting in bankruptcy over a controversy between trustees in bankruptcy and an adverse claimant relating to the title or possession of property in the custody of the latter and held that in the absence of the adverse claimant's consent there was no jurisdiction. It held that such court had jurisdiction, after reasonable notice to claimants to present claims, to determine the claims of all parties to property which its officers had lawfully reduced to actual possession in the course of the administration of the estate of the bankrupt. To the same effect is *Clay* v. *Waters*, 178 F. 385; *Shea* v. *Lewis*, 206 F. 877; *In re McMahon*, 147 F. 685; *In re Lipman*, 201 F. 169.

This Court in its former opinion, referring to the serious question as to jurisdiction on the part of the Referee to make the summary order on Lyvers, referred to *May* v. *Henderson*, 268 U. S. 111, and *Harrison* v. *Chamberlin*, 271 U. S. 191. In *May* v. *Henderson*, page 115, the Court said: "It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a Bankruptcy Court." There the property was held by the assignee of the bankrupt and it

was held the trustee in bankruptcy could recover it in a summary proceeding. In *Harrison* v. *Chamberlin* the property was in possession of the adverse claimant, and the Court said, p. 193, "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit." Neither of these cases is applicable to the situation here, for the party claiming to hold adversely in the present case brought the action in intervention and consented thereby to the jurisdiction.

The possession referred to in the authorities to confer jurisdiction may be actual or constructive. *O'Dell* v. *Boyden*, 150 F. 731; *In re Cochran et al*, 40 F. (2d) 282; *In re Jones*, 42 F. (2d) 269. *O'Dell* v. *Boyden* and *In re Cochran, supra*, were cases where a seat on the stock exchange was held to be constructively in possession of the bankruptcy court, even though the approval of the Board of Directors of the Exchange was necessary to a transfer of the seat. In the *Cochran* case, 40 F. (2d) 282, 284, the Court said, "The possession may have been constructive and not manual, but it was only because it was not capable of more tangible custody, and it was an adjudication not in possession of adverse claimant, and the jurisdiction of the bankruptcy court attached." These various authorities abundantly support the proposition that a referee in bankruptcy has no jurisdiction to make a summary order determining title to property claimed to belong to the bankrupt estate and which is not in such possession of the bankruptcy court as to constitute "custodia legis" but is held by an adverse claimant, unless such adverse claimant consents to jurisdiction.

The procedure adopted is not important if such possession of the property in controversy exists. This Court held in *Galbraith* v. *Robson-Hilliard Co.*, 216 F. 842, that if the court had possession of the property it could adopt any procedure that constituted due process of law and that a summary procedure was due process. So the queries arising here are (a) Was there actual or constructive possession of the property by the bankruptcy court? (b) If not, did the Lyvers Syndicate through Lyvers as Trustee, consent to jurisdiction?

Appellant insists that the Trustee in Bankruptcy had no possession of the property covered by the Bilyou Lease. Prior to bankruptcy proceedings against the Gusher Syndicate Williford as Re-

ceiver in the State Court had taken physical possession of some of the producing properties of the Mike Lyvers Syndicate. The Bilyou Lease was vacant property. The Trustee never undertook to drill wells thereon, and it is true that the oil and gas under the lease could not have been reduced to actual possession except by drilling, but he went upon the property, put up notices that it was in his possession as Receiver and Trustee in Bankruptcy, warned other persons off and was certainly executing such dominion over the lease as it was possible to do without drilling. There could be no question as to possession of the properties in the name of the Lyvers Syndicate actually being operated, such as the Johnette and Mullins Leases. During the period of bankruptcy administration and up to the time the property was conveyed to the Natural Gas and Petroleum Corporation the Trustee continued to assert possession of the producing and non-producing properties in the name of Mike Lyvers as Trustee, and paid the annual rental of $40.00 due on the Bilyou Lease in order to preserve it as an asset of the bankrupt estate. No one else seemed to have enough interest in it to do this. The unit holders quite generally recognized this possession. Appellant refers to *Midkiff* v. *Colton*, 252 F. 420, 424, which holds that, "Adverse possession of the minerals could have been started only by actual working of them or some other act of dominion over them showing assertion of title and use in accordance therewith." That case however involved the question of actual possession or user being sufficient to create rights by adverse possession. It is not the same question as the assertion of dominion necessary to constitute "custodia legis" in a bankruptcy court. In 6 Corpus Juris, section 432, p. 228, it is said: "Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof; but some notorious act as nearly equivalent to actual seizure as practical must be substituted, and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the court."

The trial Court made a finding of fact that the forty-acre tract of land covered by the Bilyou Lease was taken possession of by Barney in November, 1923, as Receiver in the United States District Court in a suit in bankruptcy against the Harry Morris Guaranteed Gusher Syndicate No. 3, in which Barney was afterwards elected trustee. There was substantial evidence to support such finding. In our judgment there was such possession of the property covered by the Bilyou Lease as to constitute "custodia legis"

and give jurisdiction to the bankruptcy court to determine in a summary proceeding the question of title thereto. However, if there was not such possession it would not defeat jurisdiction as it appears that the adverse claimant brought the proceedings in intervention and invited the bankruptcy court to act, thereby consenting to its jurisdiction. In 5 Remington on Bankruptcy, section 2195, p. 280, it is said: "Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interests in the property, may be tried out in the bankruptcy proceedings," and at page 284, "Thus, also, an adverse claimant confers jurisdiction by consent when he comes into the bankruptcy court and asks for the surrender of property, or for the declaration of a lien thereon, where the property is in the custody of a trustee in another state," and at page 287, "The appearance in the bankruptcy proceedings and, without objection to the jurisdiction, the submission of the questions of ownership or of priority to the referee for adjudication, amount to consent." It was held in *Taubel, etc.* v. *Fox*, 264 U. S. 426, that Congress had not provided "that a substantial adverse claim to property which is not in the possession of the bankruptcy court and which is demanded by the trustee under subdivision f of sec. 67 may be litigated, without consent, by a summary proceeding." This Court in *Wells & Co.* v. *Sharp*, 208 F. 393, held that consent of adverse party would confer jurisdiction on the bankruptcy court.

Further, no objection to the form of proceeding appears to have been taken until too late. The adverse party came into the bankruptcy proceeding and asked to have the ownership of the Bilyou Lease and other leases determined, and after the Referee had made his order on March 6, 1924, determining such ownership, Lyvers excepted on March 13, 1924, to the jurisdiction of the Referee to hear and determine the issue in a summary proceeding. There had been no insistence on a plenary proceeding and no objection to a summary proceeding until after the Referee had rendered his decision. *In re Hopkins*, 229 F. 378, 380, the Court said: "The question was presented to the trustee whether he would proceed sum-

marily or by plenary suit and he elected the former without objection by the bankrupt, his wife or anyone else. Having proceeded without objection we think it is too late now to present a question which is addressed solely to the form of the proceeding. If the objection had been made at the time the trustee was required to elect, it is quite possible that the petitioner's contention would have been sustained, but she, apparently acquiesced in the summary proceeding as the most satisfactory way of disposing of the question and we are of the opinion that it is too late to present the question on this review by an appellate court."

A bankruptcy court has the power in the first instance to determine the existence of the conditions upon which its right to proceed depends. *Taubel, etc. Co.* v. *Fox,* 264 U. S. 426. In *Priest* v. *Weaver,* 43 F. (2d) 57, 59, this Court held that the bankruptcy court had jurisdiction to determine whether it had possession of the property actual or constructive, and that, "If it had possession, it could determine in a summary proceeding, controversies involving substantial adverse claims thereto; but if it lacked possession, it could not, in a summary proceeding, adjudicate the validity of a substantial adverse claim."

We are satisfied that the bankruptcy court had jurisdiction to try in a summary proceeding the question of title to the Bilyou Lease raised by the Lyvers intervention on the ground: (a) that it had possession in the sense of "custodia legis" of the property involved, or (b) that Lyvers consented to its jurisdiction, and did not object to the summary form of the proceeding until the Referee had made his order.

That Lyvers attempted to withdraw his intervention is not important, as the counter-petition had been filed asking affirmative relief, and it was too late then to withdraw. *Ex parte Skinner & Eddy Corporation,* 265 U. S. 86; *Greenville Banking & Trust Co. et al.* v. *Selcow et al.,* 25 F. (2d) 78; *Scholl Mfg. Co.* v. *Rodgers, Trustee* (opinion this Court, filed August 10, 1931), is not an authority to the contrary.

The controlling point in this case is whether Lyvers was bound as Trustee of the Lyvers estate or only as an individual by the proceedings in the bankruptcy court. Appellant claims that the record before the Court in the present appeal as to this question is identical with that in the former one, and therefore the holding there as to the order on Lyvers that "it was not an adjudication against him

as trustee and it does not estop the plaintiffs as successor trustee to maintain this bill," settles the question as it becomes the law of the case. We have before pointed out that the situation presented in the present hearing was not the same as in the former where the entire case rested on the allegations of the complaint. Here there was additional evidence bearing upon whether Mike Lyvers intervened on behalf of the estate as trustee or as an individual. The trial Court held there was no distinction between Lyvers as an individual and as a trustee under the record of this case, that Lyvers' identity remained unchanged. We have heretofore pointed out that the order of the trial Court upon Lyvers was not to convey merely property owned by him personally, but to convey all of the property *described in the intervention,* which covered property held by the Lyvers Syndicate and by Mike Lyvers as Trustee. It is true that Lyvers' petition of intervention refers to Barney, Trustee, holding possession of *individual* property of his. This might be accounted for by section 1, Article 10 of the Trust Declaration, which is as follows:

"The trustee of this trust estate shall be self perpetuating and as such trustee shall own in his own name the legal title to the corpus of the trust and shall have the absolute management and control of the whole and entire res or corpus, both in present and future, including the power of sale, pledging, mortgaging, bonding and the incumbrancing in any manner or form whatsoever, together with the absolute power of alienation, substitution and distribution as in these articles provided."

Under this Article Lyvers could hold the property of the Syndicate in his own name and could appear without joining the unit holders. He was trustee of an express trust. This Court has held in *Mathis* v. *Hemingway,* 24 F. (2d) 951, that such trustee could sue in his own name without joining with him the party for whose benefit action was brought. *Kerrison, Assignee,* v. *Stewart, et al.,* 93 U. S. 155.

Of course Lyvers might have owned other oil properties in which the Syndicate had no interest, but the record shows that as to the Bilyou Lease he had no title whatever except as trustee. The Court properly considered that the right to all the properties set forth in Exhibit "A" to Lyvers' complaint was in controversy. The Bilyou Lease was included therein. Lyvers had no difficulty in understanding what the order to convey meant, as he made deed to the Trustee in Bankruptcy in pursuance of the order of the Referee.

affirmed by the Court, and made it individually and as Trustee of the Lyvers Syndicate. Whatever interest he had in the Bilyou Lease in any capacity whatever was put in issue by the response of Barney to his petition denying that Lyvers had any interest whatever in the leases and that all beneficial interest therein was in the Gusher Syndicate. He also asserted that the oil and gas leases held by Lyvers were purchased with the moneys and assets of the bankrupt estate, and that Lyvers held them as trustee for the benefit of said estate, and that he was a mere employe of Harry Morris as Trustee. This certainly amounted to a declaration that there was no beneficial interest in the property in the Lyvers Syndicate. The issue was clearly drawn, a trial was had, evidence was introduced, and a decision rendered. Surely the Court was not engaged in the useless procedure of trying title to the Bilyou Lease as between Lyvers as an individual and the bankrupt estate. The proceeding in intervention was prosecuted by him in his representative, and in none other, capacity. Otherwise the Referee and the Court were engaged in a farcical performance in passing on title as to the lease between Lyvers individually and the bankrupt estate when Lyvers never had, or claimed to have, any individual title to the leases of the Lyvers Syndicate, and when the record shows that all the title he had was as trustee. In the case of *Linton* v. *Omaha Wholesale Produce Market House Co.*, 218 F. 331, 335, this Court said: "It is contended by appellant's counsel that, as Adolphus F. Linton was not impleaded in the Becker suit as trustee, but as an individual, in his own right, he cannot be estopped from prosecuting this suit, in which he appears in his capacity as trustee for his children, by the judgment rendered against him in that suit. Here, too, we think the assumption is unfounded. It is true he was not designated in the caption of the Becker suit as a trustee, but averments are found throughout the bill in that suit which most clearly disclose that he was there charged with making a claim to the lots in question solely as trustee for his children. It is quite common and altogether proper to describe the capacity of a named defendant or his relationship to other parties in the body of the bill, without disclosing them in the style of the action at all. Not only so, but the defendants in the Becker case pleaded affirmatively that Mr. Linton held title to the lots in question for his children, and the case was tried on that issue. That issue was, therefore, not only made, but fully tried, in the Becker suit." In 34 Corpus Juris, section 418, p. 998, it is said: "A party is not bound by a former judgment where he sued or defended in the one action in his individual capacity and in

the other in a representative character, as guardian or next friend, executor or administrator, trustee for others, attorney in fact, assignee in bankruptcy or insolvency, receiver, or member of a corporate board, unless in any of these instances he was made a party to the first action in both capacities, or the scope of the litigation was such that all his rights or interests, held in any of his capacities, were before the court and involved in its decision." In *Williams* v. *Southern Pacific Co.*, (Cal.) 202 Pac. 356, 359, the rule is stated: "Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in the one case is conclusive of his rights in the other." All the rights or interests that Lyvers had were before the Referee, and the proceeding there holding that Lyvers had no interest in these leases, affirmed by the District Court, constitutes res adjudicata on the question of title to the Bilyou Lease as between the Lyvers Syndicate and the predecessor of appellee, which acquired the title held by the bankrupt estate. As the proceedings were binding on Lyvers as Trustee, they are binding upon his successor, and prevent the relief asked by him in this suit. In both cases there was the same claim, the same demand, the same parties or privies.

The interesting contention is made by appellee, which was not passed on in the former trial, that the properties of the Lyvers Syndicate had by merger passed into the ownership and control of the Gusher Syndicate and that creditors of that Syndicate could have subjected the leases held in the name of Mike Lyvers as Trustee to the payment of their claims. These syndicates are somewhat peculiar. They are not corporations, nor are they exactly in the nature of partnerships, but are rather closely akin to them. They are common law business trusts, and are subject to a more or less independent control or management, vested generally in a trustee. Questions have arisen in the various states where these syndicates are common as to their status. The Kansas decisions, in which reference is made to them, hold that such trusts validly created in other states, are "foreign corporations" for service of process and blue sky law proceedings. *Harris* v. *U. S. Mexico Oil Co.*, 204 Pac. 754; *Home Lumber Co.* v. *Hopkins*, 190 Pac. 601; *Hamilton* v. *Young*, 225 Pac. 1045. In the latter case the Court refers to such syndicate as a legal entity distinct from the persons who compose it. This status has been questioned in tax matters arising under

the Federal Revenue Acts, and it has been held that they may be partnerships under State laws but are corporations within the definition of the Revenue Act of 1918. *Burk-Waggoner Oil Ass'n* v. *Hopkins, Collector*, 269 U. S. 110; *Hecht* v. *Malley*, 265 U. S. 144. In *Hemphill* v. *Orloff*, 277 U. S. 537, it was held that a common law trust created in one state might be forbidden to do business in another until it had obtained the license required of foreign corporations and associations in general. These cases show there is an analogy between corporations and such common law trusts. We have found no cases dealing with the question of merger of common law trusts, but in the case of corporations it has often been held that a common control and management in a situation where a parent corporation has organized one or more subsidiaries results in what may be properly called an implied merger, which has been defined as a "confusion of rights." In some of these the parent corporation has been held liable for the tort of the subsidiary. *Davis* v. *Alexander*, 269 U. S. 114; *Chicago, M. & St. P. Ry. Co.* v. *Minn. Civic Ass'n*, 247 U. S. 490; *Lehigh Valley R. Co.* v. *Delachesa*, 145 F. 617; *Costan* v. *Manila Electric Co.*, 24 F. (2d) 383. That the fiction of corporation entity may be disregarded if the corporation is so organized, operated and controlled that it is a mere instrumentality of another corporation, is well established.

If the Lyvers Syndicate and the Gusher Syndicate were corporations we should have little difficulty in concluding that in their interrelationship and the common control and direction thereof, as shown by the evidence, the situation was such as to show that they had impliedly merged, and that both should be administered in the same bankruptcy proceeding. *In re Watertown Paper Co.*, 169 F. 252, 256, the Court stated: "(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation." *Macy* v. *Browne*, 224 F. 363; *Majestic Co.* v. *Orpheum Circuit*, 21 F. (2d) 720; *Hamilton Ridge Lumber Sales Corp.* v. *Wilson, et al.*, 25 F. (2d) 592; *Industrial Research Corp.* v. *General Motors Corp.*, 29 F. (2d) 623. In *Edward Finch Co.* v. *Robie*, 12 F. (2d) 360, this Court said, "Courts do not hesitate to look through the shell of corporate identity to get at the real purpose of the association of individuals." There can be no doubt that both the Gusher Syndicate and the Lyver Syndicate were mere instrumentalities of the Morrises. There was complete identity of con-

trol and management, and this is generally the main test as to disregarding corporate entity. Why should not the same test apply to common law trusts?

It would seem that to do complete justice the administration of the assets of the Lyvers Syndicate should be carried on in connection with the bankruptcy administration of the Gusher Syndicate. Their assets were intermingled, their accounts were confused, and their affairs were completely scrambled. All the books of these syndicates appear to have conveniently disappeared. Credit for carrying on the operations of the Lyvers Syndicate was extended either to the Gusher Syndicate or to the Morrises. Bills for the operation of the producing properties in the name of Mike Lyvers, Trustee, were paid by checks of the Gusher Syndicate and of the Morris Drilling Company. Some reimbursements were made by the Lyvers Syndicate to the Gusher Syndicate or the Morrises for expenses incurred. However, the checks therefor were drawn by the Morrises themselves. The evidence shows that from the time the Lyvers Syndicate was created its moneys and properties were administered by the Morrises in connection with their administration of the affairs of the Gusher Syndicate. Lyvers as Trustee had no credit extended to him—he was merely a straw man. In his testimony taken on intervention at an earlier date when he was claiming salary, he testified that he was a mere employe of the Morrises, and that the Lyvers Syndicate and the Gusher Syndicate were operated as one organization, that he had no interest whatever in the property of the Lyvers Syndicate; and the testimony of Barney was that Lyvers disclaimed to him any ownership or interest in the property. Lyvers testified that the property, referring to that owned by the Mike Lyvers Syndicate, was really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3; that he was trustee in name only, and that Harry Morris handled the business.

We have referred before to the almost complete acquiescence by the unit holders in the administration of the Lyvers property as part of the bankrupt estate. The bankruptcy proceedings as to the Gusher Syndicate were started by Dr. McComb representing unit holders of both syndicates. The unit holders were advised early in 1924 that the properties of both syndicates were being administered by the bankruptcy court, and two-thirds of the unit holders of the Lyvers Syndicate filed claims in the bankruptcy proceedings of the Gusher Syndicate as creditors thereof. Article 18 of the Trust Declaration, which is as follows, bears on this question:

"Sec. 1. The trustee herein named and all successors trustee may in his discretion terminate this trust by merger or reorganization in any manner or form whatsoever, and nothing herein shall be deemed to construe as a limitation or restriction upon such power or authority of the trustee, likewise the trustee may in his discretion alter, amend or abrogate any part or all of this trust agreement, as in his discretion he shall deem best in the conduct, management and control of this estate, to the best interests of the cestuis que trustent."

The trustee is given the right under this Article to terminate the trust by merger *in any manner or form whatsoever,* and nothing is to be construed as a limitation upon his power in that respect. No formal proceedings are necessary and if the conduct of the trustee is such that the result is to unite the trust with another trust we see no reason why this Article is not sufficient to cover that situation and permit a court to say that Lyvers had merged his syndicate with the Gusher Syndicate. He turned over all power of control and management of the Lyvers Syndicate to the Morrises, he gave one of them authority to issue checks, he allowed, if he did not actively assist in, intermingling the property of the two trusts and confusing their affairs so that they could not be unscrambled. This would seem to constitute merger "in any manner or form whatsoever," as provided by the Declaration of Trust. There is no question that the trusts were operated as a unit. We see no reason why the separate legal entity of a business trust cannot be merged in another business trust and such separate entity be disregarded in a case of this kind the same as it would be if these syndicates were corporations. This merger took place before the adjudication in bankruptcy, and we think the Bilyou Lease, in equity at least, became a part of the Gusher Syndicate's property prior to the adjudication in bankruptcy and hence passed to the Trustee upon such adjudication. The Trustee in Bankruptcy took possession of the assets of the Lyvers estate and liquidated them the same as he did the property of the Gusher Syndicate. The Referee in Bankruptcy paid the debts of Lyvers, Trustee, upon an equal basis with the debts of the Gusher Syndicate.

Appellant asserts that the equities of the situation are with him, while appellee insists they are with it. It is urged by appellant that the trial court's decision results in great injustice to the beneficial owners of the Lyvers Syndicate. On the other hand, appellee calls attention to the large amount paid in developing the property and

the injustice of the unit holders of the Lyvers Syndicates profiting thereby. We do not think the equities overbalance in favor of appellant. It is true that the owners of the units in the Lyvers Syndicate have undoubtedly been swindled by the operations of Lyvers and the Morrises. Persons who buy units in a trust which confers such powers upon the trustee, as the Trust Articles did here, may reasonably expect trouble, and it is strange that anyone can be found to purchase units in such a trust where absolute power was given to Lyvers not only to carry on the business and to merge the trust or dispose of its property as he chose, but also to transmit his power to a successor selected by him. The equities of the creditors of both syndicates and the equities of appellee's predecessor in title were we think much stronger than the equities of the beneficial owners of the Lyvers Syndicate. There is no claim that appellee's predecessor was guilty of any fraud or wrong doing. It purchased the property from the Trustee in Bankruptcy relying on the opinion of its attorney that the title was good. There has been expended by appellee and its predecessors over $200,000.00 in developing the Bilyou Lease. Title had been held to be in the Trustee by the Referee and by the District Court. Deed was given by the Trustee sixteen days before the Zug petition in intervention was filed, and the property was then in process of development. If title did not pass to the Bilyou Lease by the transfer from the Trustee in Bankruptcy it did not pass as to the other properties of the Lyvers Syndicate. Such holding would undo the entire transaction after creditors have been paid and the unit holders have accepted dividends, although very meagre, out of the proceeds of the sale. The decree of the trial Court we think must be sustained on the grounds herein indicated and it is so ordered. *Affirmed.*

Filed October 5, 1931.

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225 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

October Term, 1931.

Monday, October 5, 1931.

John H. Page, Trustee for Mike Lyvers Syndicate, Appellant,

No. 9102 .vs.

Arkansas Natural Gas Corporation.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the Arkansas Natural Gas Corporation have and recover against John H. Page, Trustee for Mike Lyvers Syndicate, the sum of Twenty Dollars for its costs herein, to be collected in accordance with law.

October 5, 1931.

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226 In the United States Circuit Court of Appeals, Eighth Circuit.

John H. Page, Trustee, etc., Appellant,
No. 9102 vs. In Equity.
Arkansas Natural Gas Corporation, Appellee.

Petition for Rehearing.

To the Honorable United States Circuit Court of Appeals for the Eighth Circuit:

Now comes John H. Page, Trustee of Mike Lyvers Syndicate appellant herein, and moves this Honorable Court to grant a rehearing in the above numbered and entitled cause, on appeal, for errors into which the Court has fallen and which are here shown:

1. The Court erred in holding that the law of the case did not apply to the judgment heretofore rendered by the Circuit Court of Appeals for this, the Eighth Circuit, in the case of John H. Page, Trustee for Mike Lyvers Syndicate, et al., Appellants, vs. Natural Gas & Fuel Corporation, Appellee, No. 8299, reported in 35 Fed. 2d, p. 462.

2. The Court erred in holding that there was any additional evidence adduced on the trial in the District Court which would make inapplicable the rulings in Page, Trustee, vs. Natural Gas & Fuel Corporation, No. 8299, supra, inasmuch as the record in the first case discloses the contrary, as follows:

First, to the point that Lyvers never held the property in question as an individual or in any capacity except as trustee.

(a) The bill of complaint alleges, referring to the Bilyeu lease here in dispute, that it "at all times was owned by the Mike Lyvers Syndicate, a common law trust of which Mike Lyvers was Trustee." (This record R. 5, first record R. 6).

(b) In the petition for review of Referee's order directing Mike Lyvers to make conveyance to the Trustee in Bankruptcy is the following allegation, "that Mike Lyvers was without title." (This record R. 39, first record R. 40).

227 Second, to the point that the response of Barney, Trustee, and the petition for summary order filed by Barney, Trustee, before Pope, Referee, were not in the record in the former appeal.

(a) The judgment rendered by Honorable Frank A. Youmans, Judge, on April 23, 1924, reads:

"2. That H. M. Barney as trustee for the bankrupt estate, filed his response to the intervention of Mike Lyvers and denied the allegation of ownership of Mike Lyvers.

"3. That on the same day the said H. M. Barney as Trustee of said bankrupt estate filed a petition in the same case for a summary order against Mike Lyvers, requiring him to convey to the trustee all the properties claimed by said Mike Lyvers in his intervention.

"4. That after the filing of said petition for a summary order, Mike Lyvers moved to dismiss his intervention, which was denied by the Referee." (This record R. 34, first record R. 35).

(b) That the response of Barney and his petition for summary order cannot be considered by the Court, inasmuch as neither was sworn to, as required by the Bankruptcy Act, Section 18 (c), "All pleadings setting up matters of fact shall be verified under oath," and inasmuch as Mike Lyvers, Intervener, sought to dismiss his intervention and did not consent to go to trial; and further, inasmuch as the intervention of Mike Lyvers was filed for the purpose of restraining a sale to be made on February 8, 1924, and the sale did not take place on said date, and the purpose of said intervention was therefore fully accomplished, while the hearing and judgment on the same were rendered on March 6, 1924.

(c) The deeds which were the basis of the suit and which were attached as exhibits "C" and "D" to plaintiff's bill, are conveyances by Otto L. Morris to Mike Lyvers Syndicate, (this record R. 26-27, first record R. 27-28) and to Mike

Lyvers Syndicate, Mike Lyvers, Trustee (this record R. 28-29, first record R. 29-30).

3. The Court erred in holding that G. G. Pope, Referee in Bankruptcy, had jurisdiction to pass on the title of the Mike Lyvers Syndicate in the proceedings held by him and evidenced by his judgment of date March 6, 1924 (this record R. 32-33, first record R. 33-34).

First, to the point that the Trustee in Bankruptcy had possession of the Bilyeu lease.

(a) The Bankruptcy Act, Section 70 (a), U. S. C. 110 (a), provides:

"The Trustee of the estate of a bankrupt * * * shall * * * be vested * * * with the title of the bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

228 (b) In that record title was in Mike Lyvers Syndicate and the ownership of the surface was in the original lessor or his assigns and no possession of any sort had ever been taken by physical means of the mineral estate, and no effort had been made in any way to reduce or begin operations for reducing gas, oil or other minerals to possession.

(c) That the finding that the possession was in the trustee in bankruptcy is contrary to the decision of the Supreme Court of the United States in Taubel-Scott-Kitzmiller vs. Fox, 264 U. S. 425.

Second, to the point that the Mike Lyvers Syndicate had been merged with the Harry Morris Guaranteed Gusher Syndicate No. 3.

(a) The record shows that Mike Lyvers Syndicate was a separate and distinct syndicate to which was conveyed, on April 26, 1923, the West Half of the Bilyeu lease, (this record R. 26-27, first record R. 27-28) and was also a separate and distinct syndicate on July 2, 1923, to which was conveyed the East Half of the Bilyeu lease (this record R. 28-29, first record R. 29-30), and the only evidence in the record connecting Mike Lyvers Syndicate with Harry Morris Guaranteed Gusher Syndicate No. 3 was the testimony of Jesse Riggs that he worked for Harry Morris until the middle of the summer, 1923, and of D. G. Nations that he worked for Harry Morris Guaranteed Gusher Syndicate No. 3 the first half of 1923, and

this testimony refers to property which was being developed, whereas there was no development on the Bilyeu lease, and the evidence (R. 188, 189, 190, 191) shows that Mike Lyvers Syndicate paid to Harry Morris Guaranteed Gusher Syndicate No. 3 and to Morris Drilling Company for lease equipment, expense of wells, labor, rigs, pits and tanks, and standardization of wells, as well as part of the office expenses.

(b) The ruling to the effect that there has been a tacit merger is in direct conflict with authorities to the effect that there can be no such thing as a tacit merger, but that merger must be accompanied by all the forms prescribed by law, usually of the same character and formality as the organization papers, such as charters or articles of incorporation, and must be filed in the public records, and in consequence the decision is contrary to the decisions of the Supreme Court of the United States in Central R. R. & Banking Co. vs. Georgia, 2 Otto (92 U. S.) 665; Atlantic & Gulf Railroad Co. vs. Georgia, 8 Otto (98 U. S.) 359; Southwestern Railroad Company vs. Georgia, 2 Otto (92 U. S.) 676, and the provisions of the statutes of Arkansas, and to the general jurisprudence and the holdings of courts of other circuits.

(c) That there is no evidence to show that the Harry Morris Guaranteed Gusher Syndicate No. 3 was authorized or had power to merge with the Mike Lyvers Syndicate.

Third, to the point that Mike Lyvers appeared in the intervention before Referee Pope as trustee of the Mike Lyvers Syndicate.

229 (a) The petition filed by Mike Lyvers was signed "Mike Lyvers".

(b) It reads, "Now comes Mike Lyvers of Shreveport, Caddo Parish, Louisiana";

(c) It alleges that he is "one of the creditors of the above bankrupt estate";

(d) It alleges that Barney, Trustee, "has taken possession of and is claiming certain individual property of the said Mike Lyvers."

(e) It prays "that the judge of the court or the referee therein order that the said trustee do not sell any of said properties claimed herein." (This record R. 31, first record R. 31-32).

(f) That the petition for summary order filed by Barney, Trustee, alleges,

"that said leases were taken in the name of Mike Lyvers, but that the said Mike Lyvers only took and held as trustee for the benefit of said trust estate, the bankrupt herein," [the bankrupt referred to being Harry Morris Guaranteed Gusher Syndicate No. 3], and also that petitioner

"is entitled to an order out of this court directing the said Mike Lyvers to appear before it * * * and failing so to do that the said Mike Lyvers be committed for contempt of said order directing him to execute said deed."

and the prayer of the petition follows the last allegation. (This Record 61).

(g) The declaration of trust of Mike Lyvers Syndicate is recorded in Union County, Arkansas, (this record R. 26, first record R. 26-27).

(h) The declaration of trust reads, Article XV:

"All conveyances to the trustee of this estate shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and all conveyances from such trustee shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and likewise all written instruments pertaining to this trust shall be so executed." (This record R. 23, first record R. 24).

(i) That the ruling of G. G. Pope, Referee in Bankruptcy, refers to the intervention "of Harold L. Lyvers (Mike Lyvers)" and orders that the intervention of "Harold L. (Mike) Lyvers" be denied and that he "execute conveyances * * * to the Trustee in Bankruptcy." (This record R. 33, first record R. 34).

(j) That the judgment of the district judge reads:

"1. That the said Mike Lyvers filed his intervention before the Referee claiming the property described therein as his own personal property.

* * * * * * * * *

"5. That the Referee then proceeded to hear the testimony as to the ownership of the property and upon
230 the testimony found that said Mike Lyvers was not the owner thereof but that it belonged to the Bankrupt Estate." (This record R. 34, first record R. 35).

(k) That the petition for review of Referee's order was made in the name of Mike Lyvers, signed by Mike Lyvers (this record R. 39, former record R. 40); that it refers to ownership in the Mike Lyvers Syndicate (this record R. 36,

former record R. 36-37); that it distinguishes between Mike Lyvers the individual and Mike Lyvers Syndicate (this record R. 37, former record R. 37-38);

(l) That the Referee in Bankruptcy found "the intervenors have failed and refused to appear before the referee and testify" (this record 33, first record R. 34);

(m) That the judge found "That after the filing of said petition for a summary order Mike Lyvers moved to dismiss his intervention which was denied by the Referee" (this record R. 34, first record R. 35);

(n) That the motion to dismiss the intervention and the refusal to testify on the part of Mike Lyvers cannot be construed as a waiver of his rights and an assent to the determination of the question of title but, to the contrary, a refusal to waive or so assent.

(o) That the petition filed by the said Barney, Trustee for a summary order, which petition was not sworn to, was not germane to the original petition filed by Mike Lyvers individually to restrain the sale of property, but was in the nature of an independent bill raising a new issue and could not be considered by the court, and for a greater rea-
231 son by the referee, and the finding herein is contrary to the decision of the Supreme Court of the United States in Washington, Alexandria & Georgetown R. Co., et al., vs. City of Washington, 10 Wall. 299-303.

Respectfully submitted,

FRANK J. LOONEY,
J. M. GRIMMET,
YANDELL BOATNER,
JORDAN SELLERS,
Attorneys for Petitioner.

Of Counsel:
McNally & Sellers,
El Dorado, Arkansas.
Pugh, Grimmet & Boatner,
Shreveport, Louisiana.

I certify that the foregoing application for rehearing is in my opinion well founded and not filed for purposes of delay.

FRANK J. LOONEY,
Attorney for Petitioner.

Shreveport, La.,
October 30, 1931.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 2, 1931.

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232 (Order Denying Petition for Rehearing.)

November Term, 1931.

Wednesday, December 9, 1931.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

December 9, 1931.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 9, 1931.

(Motion of Appellant for Stay of Mandate.)

Now comes John H. Page, Trustee of Mike Lyvers Syndicate, Plaintiff and Appellant in the above numbered and entitled cause, and moves this Honorable Court to grant a stay of mandate for sixty (60) days, in order that he may file a petition for certiorari in the Supreme Court of the United States. He shows that such application for certioriari will be based principally upon the following contentions:

1. That the decision of the Circuit Court of Appeals of the Eighth Circuit heretofore rendered became the law of the case, and the judgment of this Court rendered on October 5, 1931, rehearing in which was refused December 9, 1931, was inconsistent with the said law of the case;

2. That the Referee in Bankruptcy has no jurisdiction in a summary proceeding to determine title to property
233 where the original petitioner individually prays merely for the stay of a sale;

3. That the appearance of a person in his individual capacity is not his appearance in his representative capacity, as the trustee of a trust estate.

That the above will be the principal, but perhaps not the only, contentions made.

Your appearer shows that there is no reason why any additional bond should be given.

Wherefore, premises considered, plaintiff and appellant prays that this motion be held in conformity with the statutes of the United States in these matters, and that judgment and mandate be stayed for sixty (60) days from the date of the order issued by the Court, to enable plaintiff and appellant to apply for and obtain action upon such application for writ of certiorari from the Supreme Court of the United States.

YANDELL BOATNER
FRANK J. LOONEY

State of Louisiana,
Parish of Caddo

I hereby certify that I am one of the counsel for mover, plaintiff and appellant, and that in my opinion the above motion for stay of mandate is well founded, and it is not made for the purpose of delay.

FRANK J. LOONEY

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 16, 1931.

---

234 (Order Staying Issuance of Mandate.)

November Term, 1931.

Thursday, December 17, 1931.

On Consideration of the motion of appellant, supported by certificate, for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 17, 1931.

(Motion for Extension of Stay of Mandate.)

Now comes John H. Page, Trustee of Mike Lyvers' Syndicate, and shows that he has heretofore applied for Stay of

Mandate in the above numbered and entitled cause and said stay was granted until January 17th, 1932:

Further shows that since that time of the granting of the Stay of Mandate, Yandell Boatner, one of the attorneys actively engaged in this case, has been occupied with a suit in the Federal Court in Oklahoma, and Frank J. Looney has been engaged in the preference case of State, ex rel vs. Long, involving the governership of Louisiana, which cases have so occupied the time of counsel that they have not been able properly to prepare the petition for certiorari, and
235 therefore have not ordered the transcript printed:

Further shows that since the decision of Carr vs. Zaja, 283 U. S. 52, by the Supreme Court of the United States, and because of the fact that all costs in the lower court and on appeal have been paid by this appearer, the good faith of this appearer not being in question, there exists no compelling reason why the sixty days originally applied for should be refused:

Further shows that the Clerk has been directed to prepare the transcript of record and costs of same have been forwarded with this motion.

Wherefore, he prays that this Honorable Court grant an extension of Stay of Mandate until February 15, 1932.

FRANK J. LOONEY,
YANDELL BOATNER,
Attorneys for Appellant.

State of Louisiana,
Parish of Caddo.

Before me, the undersigned authority came and appeared Frank J. Looney, who being duly sworn, says:

That the above motion for extension is filed in good faith and not for the purpose of delay.

FRANK J. LOONEY.

Sworn to and subscribed, before me on this the 13th day of January, 1932.

J. N. MARCANTEL,
(Seal) Notary Public.

236 (Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 15, 1932.

(Order Further Staying Issuance of Mandate until February 15, 1932.)

November Term, 1931.

Monday, January 18, 1932.

On Consideration of the motion of appellant, supported by affidavit, for further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed until February 15, 1932, and if within said period of extension there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 18, 1932.

---

237 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein John H. Page, Trustee for Mike Lyvers Syndicate, was Appellant and the Arkansas Natural Gas Corporation was Appellee, No. 9102, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twentieth day of January, A. D. 1932.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1880)

FILE COPY

FEB 1
CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 700

JOHN H. PAGE, TRUSTEE,

Petitioner,

versus

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

PETITION FOR CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

FRANK J. LOONEY,
JUDSON M. GRIMMET,
YANDELL BOATNER,
Attorneys for John H. Page, Trustee,
Petitioner.

Montgomery-Andrus Printing Co., Inc., 430-32 Chartres, N. O., La.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No._____

JOHN H. PAGE, TRUSTEE,

Petitioner,

versus

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

PETITION FOR CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of John H. Page, Trustee for Mike Lyvers Syndicate, respectfully shows as follows:

I.

This is a suit in equity, originally filed in the Chancery Court of Union County, Arkansas, against the Natural Gas & Fuel Corporation. On application of the defendant the case was removed to the United States District Court

for the Western District of Arkansas. In that court defendant filed a motion to dismiss for no cause of action, which was sustained by the district court. *35 Fed. (2) 462.* But on appeal, the Circuit Court of Appeals for the Eighth Circuit, Judges Van Valkenburgh, Cotterral, and District Judge Scott sitting, reversed the judgment, remanding the case for trial in accordance with its opinion. *35 Fed. (2) 462.* The Arkansas Natural Gas Corporation was then substituted as defendant and the case was tried, resulting in a judgment for defendant (R. 92-119). From this judgment plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit. By that court, Judges Kenyon, Booth, and District Judge Dewey sitting, the judgment was affirmed on October 5, 1931 (R. 201-224), and motion for rehearing was denied December 9, 1931 (R. 232). This application for writ of certiorari is being prosecuted from that judgment.

II.

Statement of Facts.

There is no disputed fact in this case; only questions of law are present.

The Harry Morris Guaranteed Gusher Syndicate No. 3, a common law trust, with Harry Morris trustee, was adjudicated a bankrupt December 24, 1923 (R. 187). H. M. Barney became trustee January 29, 1924, having previously served as receiver. He immediately took steps to sell property as belonging to the bankrupt, the sale being fixed for February 8, 1924 (R. 31). An undeveloped oil lease on the NW¼ of NW¼ of Section 9 Township 16 South, Range 15 West, Union County, Arkansas, called

the Bilyeu lease, owned by Mike Lyvers Syndicate, a separate and distinct common law trust, was included in the property to be sold. The bankrupt had neither title to nor possession of this lease.

On February 7, 1924, a petition was filed by Mike Lyvers, an individual, to prevent this sale and, as an individual, he claimed the Bilyeu lease as his own. The trustee of the bankrupt had possession of certain producing property claimed by Mike Lyvers, but he only claimed to have posted a placard on the surface of the Bilyeu lease, which lease was in the possession of the owner, Bilyeu, and the placard did not describe the lease in any way, but merely stated that the property was in the custody of the district court, and was signed by the receiver in bankruptcy.

The sale did not take place February 8, 1924, and on March 6, 1924, the referee in bankruptcy issued a summary order after Mike Lyvers moved to dismiss his intervention, and passed on the intervention and also a petition of the bankrupt's trustee to have Lyvers execute conveyances to him, and entered the following order:

> "It is therefore ordered that the interventions of Otto L. Morris and Harold I. (Mike) Lyvers be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate and each is hereby ordered to execute conveyances transferring the legal title to all said properties to the trustee in bankruptcy, H. M. Barney." Signed, G. G. Pope, Referee in Bankruptcy. (R. 33).

Mike Lyvers filed a petition for review, alleging, among other things, that he had learned that the property

did not belong to him but to the Mike Lyvers Syndicate (R. 35-39). Judge Frank A. Youmans of the district court considered the petition for review and entered the following order, which we quote in full (R. 34-35):

> "On this 23rd day of April, 1924, comes on to be considered the petition of Mike Lyvers for review of the order of the Referee herein requiring said Mike Lyvers to execute to H. M. Barney as Trustee of said bankrupt estate a quit claim deed conveying to said trustee all the properties claimed by the said Mike Lyvers in his intervention.
>
> "It appears from the testimony and the record
>
> "1. That the said Mike Lyvers filed his intervention before the Referee claiming the property described therein as his own personal property.
>
> "2. That H. M. Barney as Trustee for the Bankrupt estate filed his response to the intervention of Mike Lyvers and denied the allegations of ownership of Mike Lyvers.
>
> "3. That on the same day the said H. M. Barney as trustee of said bankrupt estate filed a petition in the same case for a summary order against Mike Lyvers requiring him to convey to the Trustee all the properties claimed by said Mike Lyvers in his intervention.
>
> "4. That after the filing of said petition for a summary order Mike Lyvers moved to dismiss his intervention which was denied by the Referee.
>
> "5. That the Referee then proceeded to hear the testimony as to the ownership of the property and upon the testimony found that said Mike Lyvers was not the owner thereof, but that it belonged to the bankrupt estate.

"6. The only point involved is whether the Referee had jurisdiction to make the order upon said Mike Lyvers.

"The court finds as a matter of law that the said Referee did have such jurisdiction. It is therefore by the court considered, ordered and adjudged that the order of the Referee requiring Mike Lyvers to convey to H. M. Barney, Trustee of the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, by a quit claim deed for all of the property described in the intervention of said Mike Lyvers be affirmed.

"Frank A. Youmans,
Judge."

Some time after this order Barney, trustee in bankruptcy, procured a quit claim deed from Mike Lyvers signed by him in three capacities, namely, as an individual, as trustee for Mike Lyvers Syndicate and as trustee for another distinct syndicate, entitled "Mike Lyvers Trustee" (R. 30). This last is in no wise involved in this litigation. The Mike Lyvers Syndicate had sold to subscribers units or shares to the value of $144,000.00 (R. 126). Mike Lyvers Trustee likewise had a large number of unitholders.

Mike Lyvers, whose full name is Harold I. Lyvers, together with Harry Morris, trustee of the Morris Syndicate, had been indicted on December 12, 1923, for conspiracy to defraud the unitholders of Mike Lyvers Syndicate (R. 132), and on October 13, 1924, when he made the deed to Barney above noted, Lyvers was expecting sentence on a plea of guilty (R. 145). He was subsequently fined (R. 117). He made affidavit, as shown by Exhibit-D to the answer, that he had signed the quit claim deed under fear of punishment for contempt (R. 72).

On January 23, 1925, H. M. Barney, Trustee, contracted to sell for $125,000.00 all the property then remaining in the Morris Syndicate, to the Natural Gas & Petroleum Corporation. He included the Bilyeu lease. There was a stipulation in the contract that no deduction would be made in the price for property having no commercial value (R. 145). At this time the Bilyeu lease was burdened with an oil obligation payable out of first production, of $32,000.00, and had no value (R. 146, 186). Shortly thereafter an oil field developed around the Bilyeu lease and values were greatly enhanced (R. 186, 187). On February 20, 1925, at the instance of Jeff Davis, attorney for the purchaser, a correction deed was given by Mike Lyvers, under the same signatures (R. 150). For the execution of this deed Mike Lyvers received $600.00 personally, which is described in an affidavit attached to Exhibit-D of the answer, and made a part of defendant's answer in this case (R. 72). Jeff Davis was attorney for Natural Gas & Petroleum Corporation, Natural Gas & Fuel Corporation, and Arkansas Natural Gas Corporation.

Suit was brought by John H. Page, Trustee of Mike Lyvers Syndicate, in succession to Mike Lyvers, in the Eastern District of Arkansas, the domicile of Page, in January 1926 (R. 123). The case, in April 1927 (R. 123), was dismissed for want of jurisdiction. The allegations of the amended complaint (R. 46-48) show all the steps taken by Page, Trustee.

The present suit was then filed in Union County Chancery Court of Arkansas on December 20, 1927, and removed by the defendant, Natural Gas & Fuel Corporation, to the United States District Court for the Western

District of Arkansas (R. 15). Motion to dismiss for no cause of action was sustained by Judge Youmans of that court. This judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit, the opinion being published in *35 Fed. (2) 462, Page v. Natural Gas & Fuel Corporation*, and the case was remanded in the following language:

> "The decree of the district court is thereby reversed with direction to allow the plaintiffs to amend their bill if so advised within a reasonable time, and for further proceedings consistent with this opinion." *35 Fed. (2) 465.*

The Arkansas Natural Gas Corporation was substituted as defendant and it filed the answer (R. 49). The case was then heard by Judge Youmans and again decided by him against the plaintiff (R. 92-119).

Appealed to the Circuit Court of Appeals for the Eighth Circuit, with a different personnel, the said court affirmed the decision of Judge Youmans (R. 201), holding that there was a merger of the Morris and Lyvers Syndicates,—not because any legal forms had been pursued, but because the Morris Syndicate had assumed control of all the producing properties of the Lyvers Syndicate and had used all of the revenues, as also did the trustee in bankruptcy, and nothing was paid out for the Lyvers Syndicate except one rental of $40.00 paid during the bankruptcy proceeding, and all of the time that the Morris Syndicate was using the funds of the Lyvers Syndicate, the expenses due by the Lyvers Syndicate were paid to the Morris Syndicate and others by the Lyvers Syndicate (R. 188-191).

The sale of property by the bankrupt's trustee netted $6,000.00 more than all debts and costs (R. 154), but the same was not paid to the bankrupt, but distributed among various unitholders of various syndicates, in a dividend of ¼th of 1% (R. 148).

A full statement of facts is found in *35 Fed. (2) 462, 463*, and in the Advance Sheets of *53 Fed. (2) 27*, and R. 201, *et seq.*, to which reference is made.

The Court of Appeals on the second appeal, while recognizing the law of the case, declined to apply it because of the fact that in the proceedings before the referee above referred to, a response by the trustee in bankruptcy and a petition for a summary order on Mike Lyvers to execute quit claim deeds were offered in evidence by the defendant on the trial, and were not included in the exhibits attached to the bill of complaint which had been considered on the first appeal, although the substance of these two instruments, which were Exhibits "B" and "C" attached to defendant's answer (R. 59-60), were set forth in the affirming opinion of Judge Youmans, and are shown in substance in the finding of the referee in bankruptcy. No reference is made to Mike Lyvers Syndicate in either instrument, Mike Lyvers the individual alone being named, and before the hearing Mike Lyvers moved to dismiss his intervention.

The Circuit Court of Appeals on the second appeal also said that it was not shown on the first appeal that Mike Lyvers individually had no title, and this was said although the bill of complaint was based in the titles to the Mike Lyvers Syndicate, considered on the first appeal, and being Exhibits "B" and "C" attached to the bill of complaint (R. 26-28).

III.

The Issues in the Case.

These may be summarized briefly: The Morris Syndicate went into bankruptcy and the trustee in bankruptcy sold a lease belonging to the Mike Lyvers Syndicate, a separate and distinct entity. The purchaser had full notice that the property was the property of the Mike Lyvers Syndicate.

The Circuit Court of Appeals of the Eighth Circuit decided a question of Federal law in two directly conflicting ways: first, on the motion to dismiss for no cause of action, the Court held that a referee in bankruptcy could not summarily adjudicate title against the trustee of a syndicate in a proceeding to which said trustee was not a party in his representative capacity but had appeared as an individual seeking to stop the sale of an intangible, to-wit, an undeveloped oil lease; while the second decision held that the appearance of the individual, inasmuch as the said individual did not own the property individually, was in fact an appearance in a representative capacity, and that the decision of the referee in ordering the individual to make a quitclaim deed to the trustee of the bankrupt was *res adjudicata* against the syndicate of which he was trustee. In the second decision the Court also held that the petition of the trustee in bankruptcy filed after the date on which the sale was to take place, asking that the individual be ordered to execute a quitclaim deed, although the individual petitioner moved to withdraw his original petition, would and did serve as authority to the referee to adjudicate title against the individual petitioner, which

adjudication was final against the syndicate, and the additional evidence was sufficient to justify the Court in disregarding the original decision on appeal as the law of the case.

Another question of Federal law was involved in the holding that the possession of an intangible, to-wit, an undeveloped oil lease which had never vested in the bankrupt itself and never been possessed by said bankrupt, nevertheless could be taken possession of by the trustee in bankruptcy by merely going on the surface estate which belonged to a third party and posting notices thereon that the property was held by the court in bankruptcy, without specifically describing the property, or describing the property which was so held as an undeveloped mineral lease.

Another question of Federal law was involved in the holding that when the referee in bankruptcy found in the summary proceeding that the individual petitioner had no title as an individual, he had a right to determine and adjudicate the title against the individual which would be final against the syndicate, and need not instruct the trustee in bankruptcy to bring a plenary action but could determine title in the summary proceeding.

In addition to the above, a question of general law as well as of federal law was involved when the Court held that where the producing properties of two independent common law trusts, called syndicates, separately organized with separate trustees, were operated by one of these syndicates but the expenses were prorated between the two and the operating syndicate appropriated all the revenues

of the other syndicate, nevertheless, although no legal proceedings had been taken, there was a merger of the two syndicates, which merger vested in the operating syndicate an undeveloped oil lease which was owned of record by the other syndicate, and when the operating syndicate was adjudicated bankrupt the receiver of the bankrupt, who afterwards became trustee, had a right as receiver to take possession of such undeveloped oil lease, and as trustee to sell same as the property of the bankrupt under an order of a referee in a summary proceeding.

A question of Federal law was involved in the Court's holding that a quit claim deed, signed by a person as trustee for a syndicate, bound the syndicate under an order of a referee in a summary proceeding, where the syndicate had never been in court,—the deed having been signed by a trustee who had plead guilty to defrauding unitholders.

The opinion of the Court on the second appeal was contrary to the decisions of the Supreme Court of the United States in *May v. Henderson, 268 U. S. 111*, and of the Circuit Court of Appeals for the First Circuit in *Plymouth County Trust Company v. MacDonald, 53 Fed. (2) 827.*

IV.

Reasons for Granting Petition.

The writ of certiorari should be granted to review the action of the Circuit Court of Appeals for the Eighth Circuit which erroneously held that Mike Lyvers Syndicate was represented in the summary proceedings before

the referee in bankruptcy because Mike Lyvers had appeared therein as an individual for the sole purpose of having prevented a threatened sale of properties claimed by Lyvers as individually his; to review the same Court's holding that the referee was not bound to instruct the trustee to bring a plenary suit for the purpose of determining title as between Harry Morris Guaranteed Gusher Syndicate No. 3 and Mike Lyvers Syndicate, but on the contrary, the referee had the right summarily to adjudicate the title, and this adjudication constituted *res adjudicata* against the Mike Lyvers Syndicate; and the Court's erroneous holding that the order of the referee that Mike Lyvers execute a quitclaim deed to the trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3 meant that Mike Lyvers was ordered to execute such a deed in the name of Mike Lyvers Syndicate; also, the erroneous holding of the Court that possession could be taken by the trustee of bankruptcy of property that had never belonged to the bankrupt by purchase or otherwise and was never in his possession either actually or constructively, but in possession of Mike Lyvers Syndicate, and because even if Mike Lyvers were the agent for the bankrupt Morris Syndicate and the finding of the referee and his order is final against Lyvers, it could not be final against the Mike Lyvers Syndicate because, if Lyvers were the agent of the Morris Syndicate, his duty as trustee of the Mike Lyvers Syndicate could not be ignored and a decision could not be rendered so as to preclude the right of the Mike Lyvers Syndicate to claim property which its unfaithful trustee had made no effort to protect for the Mike Lyvers Syndicate against the Morris Syndicate; and the Court's erroneous holding that possession could

be taken of an intangible oil lease by posting a notice above the surface of the ground covered by the oil lease, when the surface was in the possession not of the bankrupt but of another person, and when the notice did not definitely describe the property taken in possession as being an undeveloped oil lease; also, the Court's erroneous holding that the decision rendered on the previous hearing in the same case by itself (Circuit Court of Appeals of the 8th Circuit) on a motion to dismiss for no cause of action, where the Court considered exhibits attached to the bill of complaint on the first appeal and remanded the case to be tried in accordance with its opinion was not the law of the case where no additional evidence had been offered in the case and the Court erroneously held that the filing by the defendant of two pleadings which had been described in the exhibits attached to the bill of complaint was sufficient additional evidence to set aside the law of the case; and, the Court's erroneous holding that the law of the case did not apply because Mike Lyvers had alleged himself to be the individual owner of an oil lease and the evidence showed that he had never been the individual owner of the oil lease, although the entire contention of the plaintiff as shown by the bill of complaint and the exhibits attached of deeds to Mike Lyvers Syndicate was based on the theory that Mike Lyvers as an individual never owned the property and Mike Lyvers Syndicate alone was the owner of the oil lease; also the Court's erroneous holding that the property of a third person could be sold by a trustee in bankruptcy on the order of a referee in bankruptcy upon a petition filed in a summary proceeding to stop a sale, where the petition was withdrawn after the date on which the sale was to take place had passed, and

the referee in spite of this fact held a hearing on a petition filed by the trustee of the bankrupt to have the individual who opposed the sale ordered to execute a quit-claim deed to the trustee of the bankrupt; also, the Court's erroneous holding that where one common law trust, called a syndicate, operated the producing properties of another common law trust, but collected the pro rata of expense from such other common law trust, despite which fact the revenues were appropriated by the operating syndicate and no legal proceedings were taken to consolidate the same, nevertheless a merger took place which authorized the sale by the trustee in bankruptcy of the syndicate which had assumed control of an undeveloped, nonproducing oil lease owned by the other syndicate, which had been deprived of its revenues and had received no benefit except the payment of a small rental on an undeveloped oil lease.

Petitioners herewith present, as part of this petition, transcript of the record in the Eighth Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Eighth Circuit, commanding that court to certify and send to this court for its review and determination; on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9102 in equity, John H. Page, Trustee, etc., Appellant, vs. Arkansas Natural Gas Corporation, Appellee, and that said judgment of the United States Circuit

Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

FRANK J. LOONEY,
JUDSON M. GRIMMET,
YANDELL BOATNER,
Attorneys for Petitioners.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and that the case is one in which the prayer of the petition should be granted by this Court.

FRANK J. LOONEY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The judgment of the Circuit Court of Appeals was entered October 5, 1931 (R. 201). Petition for rehearing was denied December 9, 1931 (R. 232). The jurisdiction of this Court is invoked under *Section 248 of the Judicial Code*, as amended by act of February 13, 1925, C. 229; *43 Statutes 936, 938; 28 U.S.C.A. Sec. 34.* The facts have been fully set out in the petition for certiorari, pages 1 to 15.

Assignment of Errors.

1. The Court erred in holding that a referee in bankruptcy had jurisdiction to determine title to an undeveloped oil lease in a summary proceeding, notwithstanding adverse claim, and that he was not required after finding claim was more than colorable to remit trustee in bankruptcy to plenary action.

2. The Court erred in holding that an individual asserting an adverse claim of title to such a lease thereby conferred jurisdiction on the referee in bankruptcy in a summary proceeding to adjudicate title to same as against the individual and against a common law trust of which such person was the trustee.

3. The Court erred in holding that a trustee in bankruptcy could take constructive possession of an undeveloped oil lease and subject same to the jurisdiction of a referee in bankruptcy when the bankrupt never had any title to said lease nor any possession, either constructive or actual.

4. The Court erred in holding that an individual who had asserted title to an undeveloped oil lease in a summary proceeding before a referee in bankruptcy to stop a sale of said lease could not withdraw such opposition before a hearing was had because the trustee in bankruptcy had filed a petition to require such person to execute a quit-claim deed to him of such lease and the referee was ready to have a hearing and grant such an order.

5. The Court erred in holding that the trustee of a syndicate acting under a trust declaration which authorized trustee to terminate trust by merger in any manner could effect merger by turning over control to persons operating another syndicate, and by allowing them to intermingle property of two trusts and confuse their affairs but without any legal proceedings whatsoever.

ARGUMENT.

The Circuit Court of Appeals for the Eighth Circuit considered on an appeal from a judgment of the district court sustaining a motion to dismiss for no cause of action, a bill of complaint with eight exhibits attached. [6] These exhibits, "A" to "G", are shown consecutively in the record, pages 16 to 43.

The Circuit Court of Appeals in its opinion reported in *35 Fed. (2) 462*, under the name of *Page v. Natural Gas & Fuel Corporation*, said, in reference to the bill and exhibits:

> "The appeal presents four main questions: (1) whether the order of the referee upon Mike Lyvers as an individual to execute the deed bound him to do that as trustee of the syndicate; (2)

whether his deed as trustee conveyed the title to the lease; (3) whether the defendant, the fuel corporation, was an innocent purchaser of the lease; (4) whether the plaintiffs were guilty of laches barring this suit. We are constrained to hold that the first three questions must be answered in the negative for sound and sufficient reasons. The last requires no absolute answer, in view of proposed amendment to the bill."

The Arkansas Natural Gas Corporation, having been substituted as defendant, filed an answer and exhibits, among which were: Exhibit-B, Response of H. M. Barney, Trustee to intervention of Mike Lyvers (R. 59); Exhibit-C, Petition of H. M. Barney, Trustee, to require Mike Lyvers to execute certain quitclaim deeds (R. 60); Exhibit-D, Petition of intervention of L. J. Zug, et al. (R. 62), to which was attached an exhibit (R. 71, 72).

On the second appeal the Circuit Court of Appeals, in its opinion shown in the transcript of record pages 201 to 224, on page 207, said:

"The rule of the law of the case is of course recognized by this court,"

and later on, states:

"The evidence introduced on the present trial shows that Lyvers never held the property in question as an individual or in any capacity except as trustee, which throws a different light upon his appearance in the intervention proceeding. At the present trial the response and the petition for summary order filed in the intervention was introduced. That was not in the former trial. The District Court in its opinion stated, 'It appears from the testimony that the only title Lyvers had was that acquired in the two conveyances to him by Otto L.

> Morris.' Further, 'The testimony clearly shows that Barney as Trustee in Bankruptcy had no possession of any property belonging to Mike Lyvers individually.' These statements are justified by the evidence. It is apparent that the evidence introduced here makes a case materially different from that appearing on the face of the complaint, therefore as to the questions we propose to discuss we are in our judgment not bound by the former decision."

We note that the Court holds, first, that Exhibit-B attached to the answer is new evidence; second, that Exhibit-C attached to the answer is new evidence; and third, that Mike Lyvers as an individual had no title.

We first call the Court's attention to the third proposition, and the statement quoted from the district court, "It appears from the testimony that the only title Lyvers had was that acquired from two conveyances to him by Otto L. Morris." These two conveyances are Exhibits "B" and "C" attached to the bill of complaint. Therefore, no argument is needed to show that the Court in the first appeal had before it evidence that the only title which was of record in this case was to Mike Lyvers Syndicate and there is nothing new in the way of evidence on this point, when the Court concludes from these two exhibits the very fact that the case is based on, namely, that Mike Lyvers as an individual had no title to convey, and that the Mike Lyvers Syndicate had title, as is shown by the findings of fact of the district judge in these words, "The record title to the Bilyeu lease was in the Mike Lyvers Syndicate, Mike Lyvers, Trustee." (R. 120). The two Morris deeds to Mike Lyvers Syndicate were conveyed in accordance with Article 15 of the Trust Articles (R. 23).

We next take up Exhibit-B attached to the answer. In this response of the trustee of the bankrupt reference is made, first, to the "intervention of the said Mike Lyvers;" second, the response denies that "Mike Lyvers is the owner of said oil and gas lease or has any interest therein whatsoever" (R. 59). Not a suggestion is made that Mike Lyvers Syndicate was not the owner of the leases, or that Mike Lyvers Syndicate is impleaded in any way.

In Exhibit-C of the petition for summary order requiring Mike Lyvers to execute quitclaim deed, an allegation is made (referring to the Bilyeu lease) "This lease is in Union County Arkansas and is owned by Mike Lyvers," and later is this allegation:

> "Your petitioner shows that said oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate, and that said leases were taken in the name of Mike Lyvers, but that the said Mike Lyvers only took and held as trustee for the benefit of said trust estate, the bankrupt herein."

The prayer is that Mike Lyvers be ordered to execute the deed and, in default thereof, to show cause why he should not be committed for contempt (R. 61, 62).

The Referee in Bankruptcy on March 6, 1924 (R. 32-33) entered the following order:

> "It is therefore ordered that the interventions of Otto L. Morris and Harold I. (Mike) Lyvers, be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate, and each is hereby

> ordered to execute conveyances transferring the legal title of all said properties to the trustee in bankruptcy, H. M. Barney."

It will be noted that no mention of Mike Lyvers Syndicate is made in the petition for summary order filed by the trustee of the bankrupt or in the order of the referee, and in the order of the referee, Harold I. (Mike) Lyvers is ordered to execute conveyances, showing that it was the deliberate purpose of the referee to have an individual whose Christian name was Harold I. Lyvers execute the conveyances.

These two instruments are the "additional evidence" so-called by the Circuit Court of Appeals on the second appeal. In the first place, they were pleadings of the defendant; in the second place, they clearly disclose that Mike Lyvers Syndicate was never impleaded. The position we take is further strengthened by the fact that in Exhibit-F to the bill of complaint previously referred to, there are two distinct instruments. The first is the judgment of affirmance of Judge Frank A. Youmans, of the Western District of Arkansas, quoted in full in the petition, *supra*, wherein he distinctly described the exhibits "B" and "C".

The district judge found that Mike Lyvers claimed the property as his own "personal" property; and then stated the substance of the response and petition of H. M. Barney, trustee of the bankrupt. This Exhibit-F was before the Circuit Court of Appeals on the first appeal.

In addition thereto, the second part of Exhibit-F is the petition for review filed by Mike Lyvers individ-

ually. In the petition for review Mike Lyvers directs attention to the fact that the property was bought with the funds of the Mike Lyvers Syndicate, a trust estate, and further calls attention to the fact that the Mike Lyvers Syndicate has not been made a party to the proceeding (R. 36, 37), and also makes the emphatic statement that, "Mike Lyvers was without title." (R. 39). This exhibit was before the Court on first appeal.

The district judge aforementioned did not consider this question whatsoever, but said:

> "The only point involved is whether the referee had jurisdiction to make the order upon said Mike Lyvers." (R. 34).

On the first appeal the Circuit Court of Appeals said:

> "We do not inquire collaterally into the merits of these proceedings, passing the serious contention that the referee had no jurisdiction to make the summary order on Lyvers. See May vs. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870; Harrison vs. Chamberlin, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897. Aside from that it is clear that the order on him as an individual had no force whatever upon him as trustee of the Mike Lyvers Syndicate. It was not an adjudication against him as trustee and does not estop the plaintiff as successor trustee to maintain this bill. 34 C. J. 984, 997, 998, 999; Troxell vs. Del. Lack. & West, R.R., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586."

When the Referee found that Mike Lyvers as an individual had no title to the property, it was then the duty of the referee either to order a sale made by the trustee of

all right, title and interest which the trustee in bankruptcy had in and to the property, or if it had developed that the Mike Lyvers Syndicate had an adverse title, to order the trustee in bankruptcy to bring a plenary action against Mike Lyvers Syndicate.

In *May v. Henderson, 268 U. S. 111, 116,* the Court said:

> "The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. Mueller vs. Nugent, 184 U. S. 1; Schweer vs. Brown, 195 U. S. 171; Hebert vs. Crawford, 228 U. S. 204; Re Ellis Bros. Printing Company, 156 Fed. 430."

And again,

> "It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court."

In the case of *Plymouth County Trust Co. v. MacDonald, 53 Fed. (2d) 827, 829,* the Court said:

> "That summary proceedings are not proper to recover possession of property formerly of the bankrupt, and held by a third party under a substantial claim of right, was conclusively established in Louisville Trust Co. v. Comingor, supra. The right of a defendant to insist that proceedings against him to recover such property alleged to have been conveyed as a preference be brought by plenary suit is too well settled to require additional citations, but in addition to the cases above cited, see Babbitt vs. Dutcher, 216 U. S. 102, 113, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Lynch v. Roberson

(C.C.A.) 287 F. 433, 436; In re Vallozza (D.C.) 225 F. 334. The qualification suggested in Harrison, Trustee, v. Chamberlin, supra, and in the cases therein cited, that a defendant may consent to the determination of such issues in summary proceedings before a District Court sitting in bankruptcy, contemplates merely a waiver of the form of the proceedings and not a consent conferring jurisdiction, since a District Court under the sections above referred to has jurisdiction to determine the issue between the parties. We think the District Court misapplied the consent clause in section 23b, 11 USCA Sec. 46(b), which permits suits by a trustee, other than those mentioned in sections 60b, 67e and 70e of the act, 11 USCA Secs. 96(b), 107(e), 110(e) to be brought in a District Court only by consent of the defendant, unless the District Court would have had jurisdiction of an action by the bankrupt if bankruptcy proceedings had not been instituted. Bardes v. Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. The consent of a defendant conferring jurisdiction under this section has no application to suits by a trustee to recover a preference, or property conveyed in fraud of creditors. Jurisdiction in such cases is expressly vested under the sections above referred to concurrently in 'courts of bankruptcy' and in any state court which would have had jurisdiction in case bankruptcy had not intervened. Courts of bankruptcy, under section 1 (8) of the act, 11 USCA Sec. 1 (8), include the District Courts of the United States, but not referees in bankruptcy.

"Again, contrary to a ruling by the District Judge, the word 'courts,' as used in section 23b, is there used in a broader sense than in other parts of the act; since in this section it includes both state and federal courts, and originally included circuit courts. Bardes v. Hawarden First Nat. Bank,

supra, 178 U. S. page 536, 20 S. Ct. 1000, 44 L. Ed. 1175. It obviously does not in this connection include a referee, Weidhorn v. Levy, *supra*, as it may in other parts of the act under section 1 (7), 11 USCA Sec. 1 (7)."

The title papers under which Mike Lyvers Syndicate held were recorded in Union County Arkansas in 1923,—one April 28, 1923 (R. 28), and one August 10, 1923 (R. 30).

It is a principle of law that has never been disputed that, as said in *Murphy v. Suir, 16 Fed. (2) 269:*

"In the absence of proof to the contrary, the presumption of the law is that possession follows, legal title."

The Circuit Court of Appeals in the first appeal, speaking of the trusteeship, said of Mike Lyvers:

"It is fundamental that he was in duty bound to act for the promotion of their interests, 26 R.C.L. p. 1289, 39 C. J. 348, 349, 350. The execution of the quitclaim deed of this property viewed as a voluntary act without consideration was therefore made without authority and was a plain breach of the trust. This being so, we find no occasion to determine whether the bill sufficiently alleges coercion or duress on the part of the bankruptcy trustee in obtaining the deed."

And again,

"The purchaser is charged with notice of every matter appearing in the deeds forming an essential link in his chain of title and those of which he would have learned by due inquiry, including a

trust such as is disclosed by the deed of the trustee of the Mike Lyvers Syndicate. 39 C. J. 1713, 1714, 1715; Simmons Creek Coal Company vs. Doran, 142 U. S. 417, 437; 26 R.C.L. 180. Inquiry by the petroleum corporation would have readily developed the pertinent facts that the order of the referee was not a direction to the trustee to make the deed and that by the declaration of trust recorded February 22, 1923, the execution of the quitclaim deed was a breach of the trust."

35 Fed. (2) 464.

In *Union Pacific Railroad Company vs. Durant, 96 U. S. 576*, the Court held that a trustee could not make a binding admission against his trust nor deny the title of the *cestuis que trusts.*

In this connection we call attention to the affidavit made by Mike Lyvers as to why he executed the quitclaim deed. (Defendant's Exhibit-D, R. 72):

In *Robertson v. Frank Bros. Co., 132 U. S. 17*, the Court said:

"When the duress has been exerted by one clothed with official authority or exercising a public employment less evidence of compulsion or pressure is required." (p. 23).

In *Maxwell v. Griswold, 10 Howard 242*, the Court said that men could be,

"coerced to do the act in order to escape a greater evil."

In *Louisville Trust Company v. Cominger, 184 U. S. 18*, the Court said:

"We are of the opinion that even if Cominger could have consented to be pursued in this

manner he did not so consent. The district court entered a peremptory order that he should pay over, disobedience of which order was punishable by committment."

In *Chicago, Rock Island & Pacific R. R. Co. v. Schenkel, 270 U. S. 611*, the Court said:

"Identity of parties is not a mere matter of form but of substance; parties nominally the same will be in legal effect different." (p. 620).

In *Troxell v. Del. Lack. & West. R. R. Co., 227 U. S. 434*, the Court said:

"Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. Brown vs. Fletcher, 210 U. S. 82; Ingersoll vs. Coram, 211 U. S. 335."

The Circuit Court of Appeals in the second trial found there was a merger of the two syndicates,—the Morris Syndicate and the Mike Lyvers Syndicate. There can be no merger except under forms of law. See *Central Railroad & Banking Company v. Georgia, 92 U. S. (2 Otto) 665, 670; Southwestern Railroad Company v. Georgia, 92 U. S. (2 Otto) 676; Atlantic & Gulf Railroad Company v. Georgia, 98 U. S. (8 Otto) 359, 362.* The evidence in this case shows that all the time the two syndicates were separate and distinct, and whatever payments were made by the Morris Syndicate on behalf of the Mike Lyvers Syndicate were repaid by the Mike Lyvers Syndicate (R. 188, 191).

The very fact that this suit is instituted by the Mike Lyvers Syndicate without any question being raised

as to the existence of the Mike Lyvers Syndicate is in itself an answer to the argument concerning merger.

The consideration of the entire case answers the argument that the equities prevailed in favor of the defendant, because the only possible contention that there were any equities in favor of the defendant would arise from the fact that the defendant was an innocent purchaser for value or was misled by the action of the Mike Lyvers Syndicate. That it was not an innocent purchaser for value was held by the Circuit Court of Appeals for the Eighth Circuit on a simple consideration of the exhibits attached to the bill of complaint, and the Court said:

> "We hold the bill amply alleged notice to the fuel corporation. It was in no sense an innocent purchaser of the property."

We have shown in the statement of facts that the record title was in Mike Lyvers Syndicate; that Jeff Davis, the attorney for the Natural Gas & Fuel Corporation, which was the first defendant in this suit, had been attorney for the Natural Gas & Petroleum Corporation which had been the purchaser, and which was the same corporation under another name as was the first defendant, and the last defendant was represented in this case by the same Jeff Davis, and was substituted at its own request. The knowled e of the attorney is further shown by the fact that he required the second deed made by Mike Lyvers to H. M. Barney Trustee (R. 150, 151, 181).

The Circuit Court of Appeals ignored the district court's finding in favor of defendant on *res adjudicata* as to the Zug petition. The record shows this petition was

addressed to the Referee in Bankruptcy and was filed on March 18th, answered on March 18th, and decided by the Referee on March 18, 1925 (R. 62, 73, 82). The Referee had lost jurisdiction on approval of the contract on January 23, 1925, and the deed to the property had been passed March 2. Even the ten days for applying to the district court had expired. The question of laches decided by the trial court did not appeal to the Circuit Court of Appeals, the Court saying:

> "We have doubt as to whether it could be applied in this case where delays were to a large extent by a faithless trustee failing to take action to correct his own wrongful conduct. Willard vs. Campbell, 248 Pac. 219." (R. 206).

The Supreme Court of the United States, in *Crary v. Dye, 208 U. S. 515*, considered a case not nearly so strong as this case, and held that equitable estoppel did not apply therein. In the case of *Ullman v. Clark, 75 Fed. 868*, a case cited by *Hughes Federal Practice, Vol. 7, Sec. 201*, by *Foster's Federal Procedure, Vol. 1, p. 145* and by *Corpus Juris, Vol. 21, p. 232*, the Court said:

> "It seems to me that the plaintiffs could more properly impute laches to the defendants of failing to take notice of their claim before they undertook to develop the land. The defendants in this action have been guilty of inordinate haste and have not exercised ordinary prudence nor sound discretion when they, in the face of the notices that were served of the claim that was asserted publicly by the plaintiff to these lands, went on in defiance of those notices and commenced their mining operations."

The amended bill of complaint filed by the plaintiff herein (R. 46) shows the reasons for the delay on the part of the plaintiff herein, and testimony substantiating the allegations is to be found in the record, pages 127 to 129. There was no dispute on this or in any other testimony anywhere in the record. For the convenience of the Court we have attached as an appendix the opinion of the Circuit Court of Appeals on the first appeal.

We respectfully submit that the application for certiorari should be allowed, and thereafter the decision should be rendered by this Honorable Court reversing the decree of the appellate court below.

Respectfully submitted,

FRANK J. LOONEY,
JUDSON M. GRIMMET,
YANDELL BOATNER,
Attorneys for John H. Page, Trustee,
Petitioner.

APPENDIX

PAGE ET AL. v. NATURAL GAS & FUEL CO.

Circuit Court of Appeals, Eighth Circuit

October 7, 1929

(Opinion of the Court on the first appeal, 35 Fed. [2] 462)

"Cotteral, Circuit Judge. The appellants, John H. Page, successor to Mike Lyvers, trustee for Mike Lyvers Syndicate, and that syndicate, filed their bill against the Natural Gas & Fuel Corporation, on December 20, 1927, in a state court seeking a decree to the effect that appellant trustee is the owner of the north half of a mineral lease upon a tract of 40 acres, that the lease be conveyed to them by the defendant engaged in operating it, and that the defendant account for the oil and gas produced therefrom. The suit was removed to the federal court, where it was dismissed on motion of the defendant for failure to set out a cause of action, and from that decree the plaintiffs have appealed.

"In substance, the bill alleged that on February 23, 1923, the Mike Lyvers Syndicate was organized pursuant to the laws of Arkansas as a common-law trust, for the benefit of certificate holders who paid for their interests the amount of $200,000; that the declaration was duly filed for record on February 22, 1923, in Union County, Ark.; that the syndicate through its trustee acquired the W. ½ of the N. W. ¼ of the N. W. ¼ of Section 9, township 16 S, range 15 W., in that county, that in the bankruptcy proceeding of Morris Guaranteed Gusher Syndicate, No. 3, Mike Lyvers personally intervened, claiming ownership of the north half of the lease, with the result that the decree of the referee was adverse to him, and was that he

should convey the property to the bankruptcy trustee by quitclaim deed, and the title to it was vested in the said trustee, and that decree was affirmed on review by the District Court; that he executed such deed in the belief it was in accordance with the order of the court, at the instance and direction of the trustee, who prepared the deed, as the trustee for the Mike Lyvers Syndicate, the real owner of the property, without right, power, or authority; that the lease was sold by the bankruptcy trustee to the Natural Gas & Petroleum Corporation (called the petroleum corporation), which at the time was fully advised that the property belonged to the Mike Lyvers Syndicate, a trust estate; that Mike Lyvers has signed other instruments, at the instance of the bankruptcy trustee, corrective of errors in description and affecting the interests of the syndicate in the lease; that the defendant and appellee, the Natural Gas & Fuel Corporation (called the fuel corporation), took possession of the lease under claim of ownership, by transfer, and has produced therefrom and converted to its use large quantities of oil, in excess of $500,000, and continues therein, without accounting to plaintiff and without claim thereto; that the petroleum corporation and the fuel corporation had knowledge of the above facts because Jeff Davis was fully aware of them, being their attorney at the time of both transfers to those companies; that the claim of appellee is unfounded, and is a cloud on plaintiff's title; that the stock in both companies is owned by the same parties, and they are controlled by the same officers; that the latter company took title to said property with full knowledge of all things imputed to the former company; and that the plaintiff is without a complete and adequate remedy at law.

"Copies of the declaration of trust, the proceedings in bankruptcy, the quitclaim deed, and other exhibits are attached to the bill.

"In ruling on the motion to dismiss the bill, the District Judge reviewed the history of the case. He noted the quitclaim deed was made in three capacities—as an individual, trustee for the Mike Lyvers Syndicate and trustee; that the claim of mistaken belief inducing the quitclaim deed was contrary to Lyvers' petition for review and the deed itself; that there was no allegation of deception or coercion upon him, or want of consideration to the bankruptcy trustee from his purchaser, or to it from its grantee; that the notice to Jeff Davis as attorney was without definite averment of facts, or while acting for them within the scope of his authority; and for these reasons the bill was dismissed.

"The appeal presents four main questions: (1) Whether the order of the referee upon Mike Lyvers as an individual to execute the deed bound him to do that as trustee of the syndicate; (2) whether his deed as trustee conveyed the title to the lease; (3) whether the defendant, the fuel corporation, was an innocent purchaser of the lease; and (4) whether the plaintiffs were guilty of laches, barring this suit. We are constrained to hold that the first three questions must be answered in the negative, for sound and sufficient reasons. The last requires no absolute answer, in view of a proposed amendment to the bill.

"1. The intervention in the bankruptcy proceeding was made solely by Mike Lyvers, as an individual, representing that the bankruptcy trustee had taken possession

of his property, consisting of leases, including the 40 acres in dispute, requesting that the producing property be turned back to him and that the trustee sell none of the property. The referee found that the property was claimed by Lyvers and another, one Morris, was purchased with funds derived from the sale of units of the bankrupt's trust estate, was taken in their names and the name of Mike Lyvers, trustee, and thus handled for their convenience, the funds were commingled and hard to trace, the interveners failed to testify, but appeared by attorneys and cross-examined the witnesses. The referee thereupon ordered that the interventions of Lyvers and Morris be denied, that the title to the property be vested in the bankruptcy trustee, and that the interveners execute conveyances of the legal title to the property to said trustee. On review, the District Judge found that the trustee had filed a petition for a summary order requiring the conveyances; that thereafter Lyvers moved to dismiss his intervention, and the motion was denied; that the referee had found the property belonged to the estate; that the only question was one of jurisdiction to make the order, and it was sustained. The order of the referee requiring the quitclaim deed by Lyvers was affirmed.

"We do not inquire collaterally into the merits of these proceedings, passing the serious contention that the referee had no jurisdiction to make the summary order on Lyvers. See May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870; Harrison v. Chamberlin, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897. Aside from that, it is clear that the order on him as an individual had no force whatever upon him as trustee of the Mike Lyvers Syndicate.

It was not an adjudication against him as trustee, and does not estop the plaintiff, as successor trustee, to maintain this bill. 34 C. J. 984, 997, 998, 999; Troxell v. Del., Lack. & West. R. R., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586.

"2. The next question arising from the execution of the quitclaim deed calls for some notice of the declaration of trust. It is prefaced by a recital that Mike Lyvers, as trustee, being about to take title to certain oil and gas leases, declares that he and his heirs, successors, administrators, and executors shall hold said leases and all other property that may be transferred to him as trustee upon the trusts therein set forth, for the benefit of the owners of certificates of interest. This is followed by some twenty articles defining the powers of the trustee and the rights of the beneficiaries, to whom the certificates were to issue for the consideration to be paid to the trustee of $10, or multiples thereof, entitling them to the benefits of the trust estate. The trust was to be known as Mike Lyvers Syndicate, with Mike Lyvers as trustee, holding in his own name the legal title to the corpus of the trust, possessing the sole power of selling, mortgaging and incumbering the property, in any manner or form, delegating the same, in record form, until superseded, and with the sole right to resign and power to name his successor, with the same powers. Alienation of or liens upon the property were to work a revocation of their estate and be paramount thereto, their interest attaching to the proceeds to be undivided and inure to their heirs and assigns, their rights being confined to income distributable by the trustee. The purpose of the trust was to buy and hold oil and

gas leases, drill upon and operate them, refine the product, and barter, sell, and exchange such property. The trustee was authorized to pay salaries and expenses, and terminate the trust by merger or reorganization, etc.

"Article XIV provides as follows:

> 'Sec. 1. The trustee may at all times, for value, sell or otherwise dispose of equitable estate in the corpus, as in these articles provided, to such extent as in his discretion he may see fit, and may close the sales of same at pleasure, and the proceeds from the sale of such equitable estate in the corpus shall accrue and inure to the trustee fund by him to be expended in his discretion for promoting, procuring and effecting the purpose of this trust.'

"While the sole power of alienating the property was thus vested in the trustee, it did not authorize him to donate it to others, or sacrifice it in a manner contrary to his fiduciary obligation to the *cestui que trustent*, or dispose of it otherwise than for their benefit. A fair construction of the articles is that the purpose was to enable him to act according to his own discretion and judgment, but in keeping with those obligations and in good faith in the discharge of his trust. It is fundamental that he was in duty bound to act for the promotion of their interests. 26 R. C. L. p. 1289; 39 C. J. 348, 349, 350. The execution of the quitclaim deed of this property, viewed as a voluntary act, without consideration, was therefore made without authority, and was a plain breach of the obligations of the trust. This being so, we find no occasion to determine whether the bill sufficiently alleges coercion or duress on the part of the bankruptcy trustee in obtaining the deed.

"The petroleum corporation derived no title to the property at the sale of the bankruptcy trustee, as he was vested by his appointment only with the title of the bankrupt, the Morris Syndicate (section 110, title 11, U. S. Code, 11 USCA Sec. 110), and the order was ineffective to vest in the trustee the title of the absent party, the trustee of the Lyvers Syndicate. That company has no claim to title except through the quitclaim deed; and that instrument, for the reasons stated, conveyed no title.

"3. A purchaser is charged with notice of every matter appearing in the deeds forming an essential link in his chain of title, and those of which he would have learned by due inquiry, including a trust, such as is disclosed by the deed of the trustee of the Mike Lyvers Syndicate. 39 C. J. 1713, 1714, 1715; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 12 S. Ct. 239, 35 L. Ed. 1063; 26 R. C. L. 1280. Inquiry by the petroleum corporation would have readily developed the pertinent facts that the order of the referee was not a direction to the trustee to make the deed, and that by the declaration of trust, recorded February 22, 1923, the execution of the quitclaim deed was a breach of the trust. The defendant, the fuel corporation, was in no better position, as before it obtained the assignment of the lease on March 2, 1925, the quitclaim forming a chain in its title had been theretofore recorded on November 25, 1924. But, aside from constructive notice, the bill alleged that the petroleum corporation was fully advised that the property belonged to the Lyvers Syndicate, there was identity of the stockholders and officers of the two corporations, and further the fuel corporation took title with full knowledge of all things im-

puted to the petroleum corporation. We hold the bill amply alleged notice to the fuel corporation. It was in no sense an innocent purchaser of the property.

"4. The defense of laches is dependent on the fact that the quitclaim deed was dated October 13, 1924, the conveyance of the bankruptcy trustee to the petroleum corporation was made on March 2, 1925, and this suit was brought on December 20, 1927, summons of that date being served on January 4, 1928. As counsel assert, relief will be denied if the bill discloses laches in bringing suit. Hays v. Port of Seattle, 251 U. S. 233, 40 S. St. 125, 64 L. Ed. 243. It must be conceded, the authorities call for diligence in seeking relief where there are sufficient circumstances connected with the development of mineral leases. Without referring to the cases, our present view is that plaintiff's bill is not open to this objection, as it alleges no more than that the defendant has profited by producing large quantities of oil from the leases, and will continue to do so; and there is no averment of exploration, development, or outlays by the defendant, or of change in the value of the property.

"But we refrain from finally deciding the question, as the plaintiffs have justifiably asked leave of this court to amend the bill to meet this objection to it. It is true they elected to stand on the bill, and this would ordinarily limit them to its allegations. Security Sav. Ass'n. v. Buchanan (C.C.A.) 66 F. 799; Investor's Guaranty Corp. v. Luikart (C.C.A.) 5 F. (2d) 793. But we consider that the objection was not expressly set out in the motion to dismiss the bill, the dismissal was not based upon it, counsel

for appellants advise us, as opposing counsel admit, it was not presented to the District Court, and they assert they would have there amended the bill had this been done. They claim surprise it is raised on appeal, and for this reason they have presented to us the motion to amend. Their election to stand on the bill should not therefore conclude them. In any event, the appellee is not entitled to an affirmance of the decree in this case on the ground of laches.

"This court has the power to allow an amendment even on appeal in the interest of justice. Jones v. Meehan, 175 U. S. 1, 29, 20 S. Ct. 1, 44 L. Ed. 49; Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055. It may be done where the facts appear in the record, the practice, however, being to remit the question to the trial court. Norton v. Larney, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413. The proposed amendment will be properly allowed by the District Court; and, if made, the question of laches will be for determination by that court. Otherwise, as we conclude, the bill states sufficient facts as a basis for relief.

"The decree of the District Court is therefore reversed, with direction to allow the plaintiffs to amend their bill, if so advised within a reasonable time, and for further proceedings consistent with this opinion.

"Reversed."

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 700

JOHN H. PAGE, TRUSTEE, ETC.,
Petitioner,

against

ARKANSAS NATURAL GAS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

FRANK J. LOONEY,
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YANDELL BOATNER,
Counsel for Petitioner.

JOURNAL PRINTING CO., SHREVEPORT

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Supplemental Brief on Behalf of Petitioner.

Supplementing the original brief filed herein in respect of the points referred to by the Court of Appeals as a basis for its decision, the following is with respect submitted:

I.

The order of the referee directed to Harold L. (Mike) Lyvers had no force or effect whatever upon Mike Lyvers Syndicate.

Reference is made by the Court of Appeals to the provision in Article 10 of the Declaration of Trust to the effect

that the trustee shall own in his own name the legal title to the corpus of the trust, and further to the fact that Mike Lyvers was the trustee of an express trust, and to the ruling of the Court in previous cases to the effect that such a trustee could sue in his own name "without joining with him the party for whose benefit the action was brought" (R. 215). The phrase quoted affords an explanation of the recitals of the Declaration of Trust and decisions referred to. It is true that Article 10 of the Declaration of Trust provides that the trustee shall own in his own name the legal title to the corpus of the trust, but this means that he shall own and hold the property in his own name as trustee of Mike Lyvers Syndicate, rather than that title to the real estate be held in the *name of 3,113 persons* (R. 126) *who constituted the beneficial owners of the corpus of the estate.* It is provided in Article 20 of the Declaration of Trust that the document must be construed as a whole and in this connection the provisions of Article 15 must be referred to, wherein it is stipulated:

> "All conveyances to the trustee of this estate shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and all conveyances from such trustee shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, *and likewise all written instruments pertaining to this trust shall be so executed*" (R.23).

The decisions which are cited by the Court of Appeals holding that the trustee of an express trust may sue in his own name may likewise be explained. This expression means that the trustee may sue in his own name as trustee without the necessity of joining all of the beneficial owners of the trust estate as parties plaintiff. The citations made by the Court in its opinion demonstrate this to be the correct prin-

ciple. It was formulated to avoid the rule in many jurisdictions requiring the real party in interest to bring suit. In *Mathis vs. Hemingway, 24 Fed. (2) 951*, it was clearly made to appear that the plaintiff brought suit in his capacity as trustee. We quote from the report of the case at page 953:

> "The complainant alleged the resignation of Moorehead Wright as trustee, the appointment of himself as his successor, the execution of the first and second deeds of trust, the indebtedness secured thereby, and default in the payments agreed to be made by the grantors, etc."

In *Kerrison, Assignee, vs. Stewart, et al., 93 U.S. 155*, it is likewise made to appear from the opinion that the trustee appeared in the proceedings under consideration in his representative capacity, and the only question was whether it was also necessary to make parties to the proceeding the persons for whose benefit the trust was made, being certain creditors of the firm of Kerrison and Leiding. It was decided that it was unnecessary to make such *cestuis que trustent* parties to the action. The case would have application to the case at bar if the question here were whether all of the unit holders of Mike Lyvers Syndicate were necessary parties. The principle of law involved is made a part of equity rule 37, wherein it is provided:

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."

And it is stated that while this is a new rule, it is merely declarative of settled law. *Hopkins Federal Equity Rules, 7th Edition,* p. 224. But it is a misapplication of this principle to say that the trustee of an express trust may sue in his own name without qualification and without plainly indicating his representative character.

The rule is well settled to the effect that one suing as trustee must set out his representative character, the facts showing the trust relation, the circumstances of his appointment and the powers with which he is vested.

Troxell vs. Delaware, Lackawanna & Western R.R., 227 U.S. 434;
Held vs. Houser, 53 Colo. 363, 127 Pac. 139, 140;
Hutchinson vs. Wood, et al., 109 N.E. 794, 59 Ind. App. 537;
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School District No. 42 vs. Peninsular Trust Co., 13 Okla. 479, 75 Pac. 281.

The cases cited by the Court of Appeals in its opinion are not in contradiction of the doctrine above enunciated, but in affirmance of it. In *Linton vs. Omaha Wholesale Pro-*

duce Market Company, 218 Fed. 331, the capacity of the plaintiff as trustee was not disclosed in the title of his bill of complaint, but the opinion shows that it was distinctly and clearly averred in the body of the bill that the plaintiff sued in his capacity as trustee. An interesting contrast to this case is found in *Leonard vs. Pierce, 182 N.Y. 431, 1 L.R.A. (N.S.) 161,* where it is held that naming a defendant individually in the *title* of the bill and stating a cause of action against him as trustee in the *body* thereof renders the complaint demurrable. The two cases taken together only justify the statement that the authorities are divided upon the question of whether a party must not be expressly designated in his representative capacity both in the *title* or *caption* of the bill and in the *body* of the bill. In *Williams vs. Southern Pacific Company, 54 Cal. App. 571, 202 Pac. Rep.* at p. 356, it was held that an award in a workman's compensation proceeding instituted by the wife of a deceased employee in her individual capacity was not a bar to the whole cause of action in an action under the Federal Employers' Liability Act, brought by her as administratrix for the benefit of herself and an adult daughter, *the plaintiffs in the two proceedings not being the same.* The opinion refers to *Black on Judgments, 2d Ed., Sec. 536,* as authority for the proposition that if one sues as trustee and afterwards sues in his individual capacity in respect of the same subject matter, he is bound by the decree in the former suit, "for if, at that time, he owned the subject matter of the trust, he was representing himself." As in the instant case it is established that Lyvers had no individual interest whatever in the property, but that the title thereto was at all times in Mike Lyvers Syndicate, the conclusion to be drawn from the authorities mentioned is that the adjudication upon the petition of Mike Lyvers individually had no binding force whatever upon Mike Lyvers Syndicate; and this is precisely the conclusion

which the Court of Appeals reached upon the first hearing of this case.

In its first opinion herein the Court of Appeals referred to the provisions of the articles of the Declaration of Trust and specifically to the fact that Mike Lyvers was authorized to hold title as trustee in his own name:

> "The trust was to be known as the Mike Lyvers Syndicate, with Mike Lyvers as trustee, *holding in his own name the legal title to the corpus of the trust*, possessing the sole power of selling, mortgaging, and encumbering the property, in any manner or form, delegating the same, in record form, until superseded, with the sole right to resign and power to name his successor, with the same powers. * * * ." From opinion, *Page vs. Natural Gas & Fuel Corporation, 35 Fed. (2) 462, 464.*

This point, therefore, had been previously considered by the Court of Appeals, and the considerations now stated were not permitted to prevail against its conclusion that the appearance of Mike Lyvers before the referee was as an individual and not as trustee of the Mike Lyvers Syndicate.

In the foregoing discussion it has been assumed for purpose of argument that an issue properly was before the Court in respect of the capacity in which Mike Lyvers was impleaded in the proceedings before the referee. But we invite attention to the fact that upon the trial of this case there was no issue made by the pleadings to the effect that Mike Lyvers filed his intervention in any other than a personal and individual capacity, and that it was therefore beyond the pleadings for the Court to find that the intervention of Mike Lyvers was filed on behalf of Mike Lyvers Syndicate. Article 3 of the answer of the defendant (R.

50) and the latter part of Article 14 (R. 55) dealing with this subject were stricken from the answer (R. 89-90).

We quote from the order of the District Court dealing with plaintiff's motion to strike as follows:

> "That the following allegations appearing in the third paragraph of the answer of Arkansas Natural Gas Corporation and on the second page thereof be and they are hereby stricken from the said answer, to-wit:
>
> "' * * * but defendant denies that said intervention was filed merely in a personal capacity, but to the contrary alleges that said intervention was in truth and in fact filed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate and on behalf of said syndicate, and that at the hearing upon said intervention said property was claimed by Mike Lyvers for and on behalf of said syndicate and in his capacity as trustee therefor.' (R. 89).

And further,

> "That the following allegations of the fourteenth paragraph of said answer appearing on page 7 thereof be stricken from the said answer, to-wit:
>
> "'In this connection, defendant states and avers that while it is true that the said petitioner Mike Lyvers and the said orders of the referee and of the district court on their face did not formally mention or refer to him as trustee of the Mike Lyvers Syndicate, yet in truth and in fact said petition was filed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate, all of the proof at the hearing was upon the issue as to whether or not said leases were the property of Mike Lyvers as trustee for the Mike Lyvers Syndicate, and not of Mike Lyvers personally, and at no time did Mike Lyvers at said hearing claim said properties other than as trustee for the Mike Lyvers Syndicate. That while the said pleadings and

orders did not refer to Mike Lyvers as trustee, yet in truth and in fact he acted as trustee in the filing of said petition, and at said hearing claimed the property as trustee for the Mike Lyvers Syndicate, and the true intent and purpose of the order of the referee and of the district court affirming same was to adjudicate the title to said property to be in the bankrupt estate of Mike Lyvers as trustee for Mike Lyvers Syndicate, and to require the said Mike Lyvers to convey, as trustee for Mike Lyvers Syndicate to the trustee in bankruptcy' " (R. 89-90).

And in harmony with these rulings the Court also struck out Article 15 of the answer, which set up the plea of *res adjudicata,* on the basis of the referee's order (R. 90). Article 15 of the answer of the defendant reads:

"Defendant accordingly states that the said quit claim deed thereafter executed by Mike Lyvers as trustee for Mike Lyvers Syndicate was in accordance with and carried out the true intent and spirit of said orders, and the defendant hereupon pleads the aforesaid entire proceeding, consisting of the petition of Mike Lyvers, petition of the trustee in bankruptcy, the testimony at said hearing, and orders of the referee and of the district court at (as) res adjudicata upon all of the issues involved in this case as between this defendant and the complainants herein, and states that the complainants are now by reason thereof estopped to further litigate said issues."

This defense was stricken by Judge Wyman for the reason that the answer as a whole and the exhibits annexed thereto disclosed that the petition of intervention as well as all other pleadings before the Referee mentioned only Mike Lyvers, and consequently there was nothing to support a defense which would result in any deviation from the ruling of the Court upon the first appeal to the effect that the ap-

pearance of Mike Lyvers in his personal capacity could in no way bind Mike Lyvers Syndicate. It follows that upon the trial hereof there was no pleading before the Court which could serve as a basis of this defense. The point not being an issue in the case, the Court of Appeals inadvertently fell into error in placing its decision on this groud. *Foster vs. Goddard, 66 U.S. 506.*

II.

The Referee Was Without Jurisdiction to Make the Order of Date 6th March, 1924, Directed to Harold L. (Mike) Lyvers.

The intervention of Mike Lyvers filed before the referee on the 7th day of February, 1924, prayed only that the referee "do not sell" any of the property referred to therein (R. 31). The answer of the trustee was a general denial, and his prayer was that the intervention be "held for naught." (R. 59-60).

The sale did not occur on February 8, 1924, (R. 59). The trustee then filed a petition styled, "Petition for summary order requiring Mike Lyvers to execute quit claim deed to trustee conveying certain oil and gas leases." (R. 60). This was a proceeding independent of the intervention previously filed by Mike Lyvers, and was in the nature of an action to try title. It was a "controversy" as distinguished from "proceedings in bankruptcy." Bankruptcy Act 23. Mike Lyvers refused to appear at the hearing held by the referee on March 6, 1924, on the petition of the trustee for a summary order against him. Nevertheless the referee proceeded to enter an order directed to Harold L. (Mike) Lyvers, requiring that Lyvers execute conveyances transferring legal title "to all said property" to the trustee in bankruptcy, H. M.

Barney, (R. 33). The Bilyeu lease was at the time of the adjudication of the Morris Syndicate as a bankrupt and at the time the referee made his order upon Mike Lyvers, an undeveloped mineral lease (R. 181). Title to the Bilyeu lease was at all times duly registered upon the public records in the name of Mike Lyvers Syndicate (R. 120).

The foregoing statement discloses that there was no jurisdiction in the referee to make the order.

Daniels, Trustee vs. Guaranty Trust Company, decided 14 March, 1932, Advance Opinions, U.S. Supreme Court, October term, 1931;

Harrison vs. Chamberlain, 271 U.S. 191;

Taubel-Scott-Kitzmiller Co., etc., vs. Fox, 264 U.S. 426;

May vs. Henderson, 268 U.S. 111;

Louisville Trust Company vs. Comingor, 184 U.S. 18;

Jacquith vs. Rowley, 188 U.S. 620;

First National Bank vs. Chicago Title & Trust Co., 198 U.S. 280;

In re Blum (CCA 7), 202 Fed. 883.

"A referee is not in any sense a separate court." *Wiedhorn v. Levy, 213 U.S. 268, 271.*

Bankruptcy Act, Sec. 1, c. 8 defines "courts of bankruptcy," while Sec. 2 reads:

"That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the Supreme Court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy."

Sec. 34:

"Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction,

(1) appoint referees * *, and may in their discretion, remove them, etc."

In *Louisville Trust Company vs. Comingor, 184 U.S. 18*, where an assignee for the benefit of creditors, under the statutes of Kentucky, asserted a claim to certain sums of money in his hands and a referee in a summary proceeding ordered the assignee to pay the sum claimed to the bankrupt's trustee, the Court said:

> "The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforcable, not by execution, but by commitment. 'We think that it could not have been the intention of Congress thus to deptive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights.' *Marshall v. Knox, 16 Wall. 556; Smith v. Mason, 14 Wall. 419.*"

In *Galbraith vs. Vallely, 256 U.S. 846*, a state assignee for the benefit of creditors appeared in a bankruptcy proceeding and filed an account claiming certain fees which he retained. The trustee in bankruptcy filed a petition with the referee asking in a summary proceeding that Galbraith, the assignee, be ordered to show cause why he should not pay over the retained sum.

Galbraith appearing, set up that he was an adverse claimant and there was no jurisdiction.

The referee sustained him, but the District Court and the Circuit Court of Appeals held otherwise.

The Supreme Court said:

"It may be as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concern-

"But the right to recover in such instances, only in suits of ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court." (850).

To again quote *Weidhorn vs. Levy, supra:*

"The jurisdiction and authority of a referee in bankruptcy under a general reference is limited to ordinary administrative proceedings and such controversial matters as arise therein and are in effect a part thereof."

Bankruptcy Act Section 23 (U. S. Code, T. 11 Sec. 46) reads:

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, ing the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96 * *."

It is obvious that the jurisdiction here given to district courts is not given to them as courts of bankruptcy and the statute uses the words, "as distinguished from proceedings in bankruptcy," over which alone referees can exercise any authority.

Clause (b) speaks of "consent of the proposed defendant" as necessary when suit is brought in a court other than the one in which the bankrupt may have brought it.

The text of the section excludes the idea that "referees" are contemplated in any way by the language of the act—it is not to be suggested that suits could be instituted before a referee.

Furthermore, consent is not an equivocal matter, and even if given can be withdrawn; the action of Lyvers personally seeking to withdraw his intervention and to keep himself clear of the referee's action is in line with the holding in *Louisville Trust Company vs. Comingor, 184 U.S. 18, 26,* "He made his final protest to the exercise of jurisdiction before the order was entered."

The referee being entirely without right to jurisdiction of the subject matter, his order is a mere nullity.

There was no possession of the Bilyeu lease by the bankrupt or the trustee. The bankrupt did not have possession of the property at the time of the adjudication nor at any other time. In the absence of actual development, constructive or civil possession followed the registered legal title.

> "The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right, and continues until he is ousted thereof by an actual adverse possession. This

is a settled principle of common law, recognized and adopted by this court in *Green vs. Liter (8 Cranch 229, 230); Barr vs. Gratz (4 Wheat. 213,* 233); *Society, etc., vs. Pawlett (4 Peters 480, 504, 506); Clark vs. Courtney (5 Peters 354, 355),* and is not now to be questioned."

From opinion, *United States vs. Arredondo, et al., 6 Peters 689, 743.*

Compare also,

Newman vs. Mountain Park Land Company, 85 Ark. 208, 107 S.W. 391;

Chancellor vs. Banks, 92 Ark. 497, 123 S.W. 650.

If the receiver tacked placards on trees on property pointed out to him as covered by the Bilyeu lease (R. 143), this could not affect the legal situation. The receiver was only entitled to possession of property of the bankrupt and could not lawfully possess or acquire the property of third persons. *Bankruptcy Act. 70.* A receiver cannot confer jurisdiction upon a court of bankruptcy by wrongful entry upon, and attempted seizure of, property not owned or claimed by and never in the possession of the bankrupt. Further, possession of the surface would not be adverse to the possession of the mineral estate. *Bodcaw Lumber Company vs. Goode, 160 Ark. 48, 254 S.W. 345.* Under the circumstances, it was both legally and physically impossible for the trustee to have possession. Compare *Ohio Oil Company vs. Indiana, 177 U.S. 188.*

The trustee was without authority to test the title of the Mike Lyvers Syndicate to the Bilyeu lease except in a plenary suit brought for that purpose in a court where the bankrupt might have brought or prosecuted it if proceedings in bankruptcy had not been instituted. *Bankruptcy Act Sec. 23.*

III.

There Was No Merger of Mike Lyvers Syndicate With the Morris Syndicate.

In arriving at its conclusion that a merger had taken place between the Mike Lyvers Syndicate and the Harry Morris Guaranteed Gusher Syndicate No. 3, the Court draws an analogy between a common law trust such as the Mike Lyvers Syndicate, and a corporation, and applies the rule of law that in an appropriate case it is permissible for courts to disregard the corporate fiction and hold a parent corporation liable for acts of its subsidiary. We have no disagreement with the Court on the proposition that a trust estate such as the Mike Lyvers Syndicate may in many respects be considered as if it were a corporation, and we agree that it is proper in the present case to treat Mike Lyvers Syndicate as if it were a corporation. *Bankruptcy Act Section 1 (6).* Compare *Hemphill vs. Orloff 277 U.S. 537.* But we would earnestly press upon the consideration of the Court the suggestion that the principle of law referred to has no application to the facts in the case at bar. The doctrine of looking through the corporate entity to hold the parent for the obligations of the subsidiary proceeds on the theory that one is the *alter ego* of the other, and that they are in substance identical. The foundation of this proposition exists in the fact that the parent is the owner of all or substantially all of the stock of the subsidiary and, in addition thereto, exercises a dominant control over it. Merger, on the other hand, proceeds on the assumption that the two corporations are *separate* in substance and in fact, and unites them into one by the execution of appropriate articles of agreement to that effect pursuant to statutory authority. The corporate fiction is disregarded by courts in the exercise of their equitable

powers to do justice in a given situation. Merger, on the other hand, can only be accomplished pursuant to statutory authority therefor and in compliance with the statutory provisions. *Ashley vs. Ryan, 153 U.S. 435.*

It is apparent that the principle of looking beyond the veil of corporate entity in order to fasten the liability of a subsidiary corporation upon the parent corporation is an altogether different thing from merger or consolidation of such corporations. The former principle might have some application to the present case if Mike Lyvers Syndicate owed some obligation to Arkansas Natural Gas Corporation, and Arkansas Natural Gas Corporation were bringing a suit wherein it was attempted to impose liability for such obligation on Harry Morris Guaranteed Gusher Syndicate No. 3, upon the theory that Harry Morris Guaranteed Gusher Syndicate No. 3 was the parent corporation and was responsible for the obligations of the subsidiary. The situation here is very different: the Mike Lyvers Syndicate does not now and has never owed any obligation to defendant. It has brought an action in respect of property belonging to it.

As we have pointed out, however, in order to succeed upon such a theory, it must be shown that the stock ownership of the subsidiary is entirely or substantially held by the parent, so that the ultimate ownership of the two corporations is identical, and in addition to this there must be the element of complete dominion by the parent over the subsidiary. Stock ownership as the foundation of this doctrine of identity of corporations is illustrated by all of the cases which the Court of Appeals cites in its opinion. In the case at bar there is nothing in the record to show that any of the certificates of interest or units in Mike Lyvers Syndicate were held by Harry Morris Guaranteed Gusher Syndicate No. 3, or any one holding any units of that syndicate. So far

as appears, the beneficial ownership of the two trust estates was entirely separate and distinct. Under such circumstances, it would not be possible to hold the Harry Morris Guaranteed Gusher Syndicate No. 3 responsible for the obligations of Mike Lyvers Syndicate on the principle of looking through the corporate fiction.

While it is true that the Declaration of Trust of Mike Lyvers Syndicate authorizes the trustee to effectuate a merger in any manner or form whatsoever, this provision must be read in connection with the general law applicable to mergers and consolidations and must be considered to mean that the trustee is authorized to effectuate a merger or reorganization in any manner or form whatever in compliance with law and in conformity with the Declaration of Trust. No statutory authority is shown for the merger of corporations under the laws of the state of Arkansas, nor does this record show whether the Harry Morris Guaranteed Gusher Syndicate No. 3 was empowered to merge or consolidate with another organization. Our examination of the laws of the state of Arkansas as set forth in Crawford & Moses' Digest (1921) discloses no general authority for the merger or consolidation of corporations. See *Section 677, p. 370,* authorizing consolidation of banking corporations; *Section 6088, p. 1628,* relating to merger of insurance societies; *Section 8514, et seq., pages 2203, et seq.,* dealing with railroad corporations.

Assuming the power to exist, however, no intention is shown on the part of the trustee to accomplish a merger. It is not suggested that any agreement of merger was drawn up and executed, or that any such agreement was ever placed of record in Union County, Arkansas, as a modification of the original Declaration of Trust. It is submitted that the only evidence in the record is that relating to the

joint operation of the producing leases. However, as regards this, it is established by the testimony of defendant's witness McComb that this was simply a joint operation for purposes of economy of administration. See Zug petition (R. 64), verified by McComb as being correct (R. 165). For expenditures made on behalf of Mike Lyvers Syndicate in connection with the operation of these properties reimbursement was made by Mike Lyvers Syndicate (R. 188-191). Even had reimbursement not been made, any expenditures made for the benefit of Mike Lyvers Syndicate by Harry Morris Guaranteed Gusher Syndicate No. 3 or others, would only create the relation of debtor and creditor and might make necessary an accounting, but this is very far from effecting a merger or consolidation of the two separate legal entities. In so far as the Bilyeu lease was concerned, there was certainly no confusion or commingling as to it, for this property was an undeveloped mineral lease, title to which at all times stood on the public records in the name of Mike Lyvers Syndicate. The suggestion that Mike Lyvers was a "straw man" is not helpful in deciding the issue. If Harry Morris himself had been the trustee of both syndicates this would not bring about a merger. It is not uncommon for the same person to be the managing executive officer of a number of corporations, but this does not result in a union of the corporations so operated. The development of holding companies is a familiar example of the management of a number of corporations by the same executive personnel, but the various corporations so managed are not on this account merged or consolidated. If Mike Lyvers as trustee permitted himself to be dominated by Harry Morris on account of personal relations or otherwise this would not involve a merger. There was no legally enforceable control. Compare *Handy & Harman vs. Burnett, adv. opinions U.S. Sup. Ct., Oct. term, 1931.*

The fact that David Morris and Otto Morris (not Harry Morris, the trustee of the Morris Syndicate), (R. 60) signed checks for Mike Lyvers Syndicate does not support the idea that these individuals were acting independently of Mike Lyvers (R. 188-191). These checks were signed pursuant to powers of attorney given to the bank by Mike Lyvers as trustee (R. 138) and this was in conformity with the provisions of the declaration of trust which permitted the trustee to appoint agents and employees as he might determine (R. 23). The activity of these agents was not in derogation of the authority and power of Mike Lyvers as trustee, but was pursuant to such power and authority and in recognition thereof. And should it be claimed that the producing property of Mike Lyvers Syndicate had been abandoned to Harry Morris Guaranteed Gusher Syndicate No. 3, it would not be possible to construe any such abandonment to be effective as a merger. It would simply be another instance of the betrayal of his trust by the trustee. We would ask the Court to consider if it would not be a singular rule of law that would have the effect of declaring that if the operating properties of the Mike Lyvers Syndicate were wrongfully abandoned to the Harry Morris Guaranteed Gusher Syndicate No. 3, the Harry Morris Guaranteed Gusher Syndicate No. 3 should thereby acquire title to all of the other property of Mike Lyvers Syndicate also. Such abandonment, even if conceded, could have no greater effect in transferring title to the property here involved than the two deeds which Mike Lyvers gave to Barney, Trustee, in respect of which the Court of Appeals took occasion to remark, upon the first appeal,

> "While the sole power of alienating the property was thus vested in the trustee, it did not authorize him to donate it to others, *or sacrifice it in a manner*

contrary to his fiduciary obligations to the cestui que trustent or dispose of it otherwise than for their benefit. A fair construction of the article is that the purpose of it was to enable him to act according to his own discretion and judgment, but in keeping with those obligations and in good faith in the discharge of his trust. It is fundamental that he was in duty bound to act for the promotion of their interest. *26 R. C. L. p. 1289; 39 C. J. 348, 349, 350.* The execution of the quit claim deed of this property, viewed as a voluntary act, without consideration, was therefore made without authority, and was a plain breach of the obligations of the trust."

Page vs. Natural Gas & Fuel Corp., 35 Fed. (2) 462, 464.

The contentions of the defendant in respect of merger were ignored by the trial court, and no assignment of error was directed to this question. We now, with respect, submit that the authorities cited by the Court of Appeals are inapplicable, and that upon the facts and the applicable rules of law, no merger of the two syndicates was effected.

Respectfully submitted,

FRANK J. LOONEY,

JUDSON M. GRIMMET,

YANDELL BOATNER,

Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1931

No. 700

JOHN H. PAGE, TRUSTEE

Petitioner

v.

ARKANSAS NATURAL GAS CORPORATION

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT S. SLOAN
Counsel for Respondent

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JOHN H. PAGE, TRUSTEE,
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ARKANSAS NATURAL GAS CORPORATION
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The nature of this case and the proceedings had therein are correctly stated in Paragraph I of the petition for certiorari herein.

While, as stated in Paragraph II of the petition, the facts are undisputed, we cannot agree that certain inferences drawn by the petitioner are correct.

Both Courts below have found the facts in favor of the respondent and we rely upon the statement of facts con-

tained in the opinion of the Circuit Court of Appeals (53 Fed. 2d Series 27, Advance Sheet No. 1, December 21, 1931).

The questions of law presented by the petition depend upon the contention of the petitioner that H. M. Barney, as Trustee in Bankruptcy of Harry Morris and Harry Morris Guaranteed Gusher Syndicate No. 3 sold to Natural Gas & Fuel Corporation, respondent's predecessor, a certain oil lease which was not a part of the bankrupt's estate. The petitioner's contention in this respect is summarized under Paragraph III, page 9, of the petition; and the several questions of law propounded in Paragraph III of the petition depend upon this understanding of the facts. We submit that the lease sold to respondent's predecessor was a part of the bankrupt estate and that title to the lease vested in the Trustee in Bankruptcy by operation of law, as was held by the Circuit Court of Appeals, and that the Trustee had full power to convey the same. The relationship between Mike Lyvers Syndicate and Harry Morris Guaranteed Gusher Syndicate No. 3 is explained in the opinion of the Circuit Court of Appeals, 53 Fed. 2d Series 27 at page 29.

At the time of the organization of Mike Lyvers Syndicate, Mike Lyvers was a young man about twenty-one years old (Tr. p. 136) and was employed by one of the Morris organizations, working by the day. The transcript (pp. 140 and 141) contains the testimony of Lyvers himself at a hearing on a claim for salary filed by him. He stated that he had worked for Harry Morris since May, 1922; that he was Trustee of Mike Lyvers Syndicate in name only; that the business of the Syndicate was handled

by Harry Morris and that the Mike Lyvers Syndicate, Harry Morris Guaranteed Gusher Syndicate No. 3, and the various other syndicates were as a whole just one organization and were all controlled by the Morrises. The Circuit Court of Appeals so found (53 Fed. 2d Series 27 at page 38).

The contentions of the petitioner based upon the assumption that the case is one where a Trustee in Bankruptcy claimed the right to the possession of property owned or claimed in good faith by a third party, are untenable because no such case is presented. Mike Lyvers Syndicate, while in form a separate entity, was in fact, as we have shown, part and parcel of the promotion schemes conducted by the Morris Brothers, and the leases held by Lyvers Syndicate were part of the estate of the bankrupt.

In answer to the points raised by the petitioner we submit the following:

I

The decision of the Circuit Court of Appeals on the appeal from the decree dismissing the bill was not the law of the case upon the trial on the merits.

After this cause was removed from the Chancery Court of Union County, Arkansas, to the United States District Court for the Western District of Arkansas, the defendant (respondent's predecessor) moved to dismiss the bill upon the ground that the same failed to state a cause of action and the District Court granted the motion.

The motion to dismiss, of course, was in the nature of a demurrer and admitted all facts well pleaded. But the Circuit Court of Appeals on that appeal had before it the single question whether the facts stated in the bill, if taken as true, showed a cause of action.

As to this single proposition the bill set forth that Mike Lyvers Syndicate was a separate and distinct entity; that the Morris Guaranteed Gusher Syndicate No. 3 had no right, title or interest in or to the leases standing in the name of Mike Lyvers Syndicate; that in the intervention proceedings instituted by Mike Lyvers he appeared in his personal capacity only and not as Trustee; that the order made by the Referee and affirmed by the District Court affected Mike Lyvers in his personal capacity only and not as Trustee. All that the Court of Appeals could properly decide was the single, limited question whether the facts pleaded in the bill constituted a cause of action. If on the face of the bill it appeared that the lease conveyed by the Trustee in Bankruptcy to respondent's predecessor was not a part of the bankrupt estate and had not legally been conveyed to the Trustee in Bankruptcy, but that nevertheless the Trustee in Bankruptcy had sold and transferred said lease, a cause of action in favor of the Trustee of Mike Lyvers Syndicate might be stated. Whether such was the case was the only question before the Circuit Court of Appeals, and the effect of the decision was limited to the precise point necessary for a decision.

Harriman v. *Northern Securities Co.*, 197 U. S. 244, 291;
Vicksburg v. *Henson*, 231 U. S. 259, 269.

After the defendant (respondent's predecessor) pleaded over, the ruling on the appeal from the decree dismissing the bill was ineffective for any purpose unless the trial on the merits developed no more than the precise facts alleged in the bill and considered by the Court when ruling on the motion to dismiss.

An entirely different situation has been developed by the evidence introduced at the trial.

If the argument on pages 18 to 22 of the petitioner's brief be understood as intimating that the only "additional evidence" before the Court of Appeals on the second appeal were the two instruments annexed to defendant's answer as Exhibits "B" and "C," it is completely refuted by what follows.

It now appears that Mike Lyvers acted as Trustee of Lyvers Syndicate only ostensibly. It now appears:

> "Credit for carrying on the operations of the Lyvers Syndicate was extended either to the Gusher Syndicate or to the Morrises. Bills for the operation of the producing properties in the name of Mike Lyvers, Trustee, were paid by checks of the Gusher Syndicate and of the Morris Drilling Company. Some reimbursements were made by the Lyvers Syndicate to the Gusher Syndicate or the Morrises for expenses incurred. However, the checks therefor were drawn by the Morrises themselves. The evidence shows that from the time the Lyvers Syndicate was created its moneys and properties were administered by the Morrises in connection with their administration of the affairs of the Gusher Syndicate. Lyvers as Trustee had no credit extended to him—he was merely a straw man. In his testimony taken on intervention at an earlier date when he was claiming salary

> he testified that he was a mere employe of the Morrises, and that the Lyvers Syndicate and the Gusher Syndicate were operated as one organization, that he had no interest whatever in the property of the Lyvers Syndicate; and the testimony of Barney was that Lyvers disclaimed to him any ownership or interest in the property. Lyvers testified that the property, referring to that owned by the Mike Lyvers Syndicate, was really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3; that he was trustee in name only, and that Harry Morris handled the business'' (53 Fed. 2d. 27, 38).

It further appears that the unit holders of the Mike Lyvers Syndicate themselves treated the assets of that Syndicate as part of the bankrupt estate. A Reorganization Committee was formed by the unit holders in the various Syndicates, including unit holders in Mike Lyvers Syndicate, and this Committee instituted the bankrtuptcy proceedings against the Morris Guaranteed Gusher Syndicate (53 Fed. 2d. 27, 29). Mr. H. M. Barney ''took actual possession of the various properties of the Gusher Syndicate and the producing leases of the Lyvers Syndicate, and as to the Bilyou Lease he put up placards on the property stating that it was in his possession as Receiver of the Federal Court'' (53 Fed. 2d. 27, 29).

> ''Meetings of unit holders of the Lyvers Syndicate were held throughout the United States, at which they were informed that the properties of the Lyvers Syndicate had been taken over by the Trustee in Bankruptcy of the Gusher Syndicate. In January, 1924, the Reorganization Committee mailed to the unit holders a form of proof of claim in bankruptcy to be used by them in filing their claims as creditors

in the matter of the Gusher Syndicate and Harry Morris, Bankrupts. This Committee organized the Moco Oil Corporation, the purpose of which was to acquire the Morris properties. The unit holders were constantly advised of the situation by the publication and distribution of a paper called 'The Moco News.' In one copy it listed properties which the Moco Oil Corporation intended to buy from the Trustee in Bankruptcy, and this list included the Bilyou Lease. In February, 1924, Mike Lyvers filed an intervention before the Referee in Bankruptcy claiming certain property taken by the Trustee in Bankruptcy, among which was the Bilyou Lease. February 15, 1924, the Trustee filed response, admitting possession of the property, and claiming it as Trustee in Bankruptcy, and denying ownership in Lyvers, and asking for a summary order directing Lyvers to execute a quit claim deed conveying certain leases of the Lyvers Syndicate to him as Trustee, alleging that said leases were purchased with moneys and assets of the bankrupt estate, and that they were held by Lyvers only as Trustee for the benefit of said estate. The matter was heard by the Referee, who held that Lyvers had no interest in this property and that all the property of the Gusher Syndicate and the Lyvers Syndicate belonged to a common fund" (53 Fed. 2d. 27, 29 and 30).

In October, 1924, the Referee in Bankruptcy mailed to the unit holders of the Lyvers Syndicate a notification to file their claims in bankruptcy as creditors of the estate and the unit holders representing more than ten thousand units filed their claims in the Gusher Syndicate bankruptcy proceedings. These claims were allowed and a dividend of two and one-half cents per unit was paid (53 Fed. 2d. 27, 30).

Thus the real situation is vastly different from that shown by the allegations of the bill which were admitted for the purposes of the motion to dismiss and which only could have been considered by the Circuit Court of Appeals on the first appeal.

The question before the Circuit Court of Appeals on the first appeal was simply whether or not the bill was good as a pleading—whether if the facts stated in such bill were confessed the plaintiff had a cause of action. A general motion to dismiss is equivalent to a demurrer and it is well settled that a ruling on a demurrer is not regarded as binding on the Court in the subsequent course of the litigation.

Wiggins Ferry Co. v. *O. & M. Ry. Co.*, 142 U. S. 396, 410;
John II Estate v. *Brown*, 201 Fed. 224, 246;
Ohio River R. R. Co. v. *Fisher*, 115 Fed. 929, 936;
Woodard v. *Outland*, 37 Fed. 2d. 87, 90;
2 Freeman on Judgments (5th Edition) Sections 717, 744 and 745.

There is no contradiction between the decisions of the Circuit Court of Appeals on the first appeal and the second appeal. On the first appeal the Court was considering facts shown by the bill; on the second, facts developed by evidence at the trial which disclosed an entirely different situation.

II

The Petitioner's Assignments of Error

Petitioner's assignments of error, set forth on pages 17 and 18 of petitioner's brief, rest upon the erroneous assumption that Mike Lyvers Syndicate was a bona fide separate entity, and that the claim set up by Lyvers in his intervention proceeding was a bona fide adverse claim.

The findings of the Circuit Court of Appeals show beyond question that Mike Lyvers Syndicate was not a bona fide separate entity (53 Fed. 2d. 27, 38 and 39). Under the express provisions of the Bankruptcy Act the Trustee in Bankruptcy took title to the leases held by the Lyvers Syndicate by operation of law and no deed from Lyvers was necessary to vest title in the Trustee. Section 70 of the Bankruptcy Act (U. S. Code Ann., Title 11, Section 110), so far as material, is as follows:

> "§110. SAME; TITLE. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor successors, if he shall have one or more, upon his or their appointment and qualification, *shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,* except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5)

property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 47 of the Bankruptcy Act (U. S. Code Ann., Title 11, Section 75), so far as material, is as follows:

"§75. SAME; DUTIES. (a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court,* shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; * * *."

No deed from Lyvers to the Trustee was necessary to pass the title to the Trustee.

Re: Friedrich, 100 Fed. 284.

The Trustee took possession of the Lyvers producing leases and posted the lease involved in this case with a notice stating that it was in his possession as an officer of the Federal Court. The Trustee paid the annual rental on the lease. Petitioner's contention that the Bankruptcy Court did not have possession of the lease is unsound. Mike Lyvers Syndicate was not working the lease, and the Trustee by posting notices did everything possible to bring the lease under the jurisdiction of the Bankruptcy Court short of actually drilling and working the property. Where the Bankruptcy Court has possession of the property it has exclusive jurisdiction to hear and determine all questions respecting the title, possession or control of the property.

Murphy v. *John Hofman Co.*, 211 U. S. 562, 568.

The contentions of the petitioner that the Court erred in holding that the alleged adverse claim of Lyvers should have been determined in a plenary action is likewise unsound. In the first place, Lyvers selected the Bankruptcy Court as the forum in which to have his claim adjudicated. The Trustee filed opposition to the claim, evidence was taken and the Referee made an order holding that Lyvers had no interest in the property but that all the property of the Gusher Syndicate and the Lyvers Syndicate belonged to a common fund. The District Court affirmed the order of the Referee. No proceedings were taken to review the

order of the District Court. In the second place, the claim of Lyvers as presented in his intervention was not even a colorable adverse claim. Lyvers, as the Court below has found, was a straw man. He never had any individual interest in the Bilyou Lease but he did claim it in his intervention petition.

The Circuit Court of Appeals in its opinion speaks of "the almost complete acquiescence by the unit holders in the administration of the Lyvers property as part of the bankrupt estate," and continues:

> "The bankruptcy proceedings as to the Gusher Syndicate were started by Dr. McComb representing unit holders of both syndicates. The unit holders were advised early in 1924 that the properties of both syndicates were being administered by the bankruptcy court, and two-thirds of the unit holders of the Lyvers Syndicate filed claims in the bankruptcy proceedings of the Gusher Syndicate as creditors thereof."

Under such circumstances Lyvers' intervention petition did not present even a colorable adverse claim and the Bankruptcy Court had jurisdiction to make a preliminary inquiry to determine whether such claim was real and substantial, or merely colorable.

In *Harrison* v. *Chamberlin*, 271 U. S. 191, this Court said:

> "*However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine*

whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding."

We submit that the procedural questions referred to in the assignments of error were correctly decided by the lower courts.

WHEREFORE, it is respectfully submitted that the application for a writ of certiorari should be denied.

Respectfully,

ROBERT S. SLOAN,
Counsel for Respondent.

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[1814]

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 700.

JOHN H. PAGE, Trustee,

Petitioner,

against

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

JOHN W. DAVIS,
ROBERT S. SLOAN,
JEFF DAVIS,
J. MERRICK MOORE,
Counsel for Respondent.

THE BALLOU PRESS, NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

JOHN H. PAGE, Trustee,
Petitioner,
against
ARKANSAS NATURAL GAS CORPORATION,
Respondent.

No. 700.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

Opinions of the Courts Below.

The District Court's opinion is not reported. It appears at page 92 of the Record. The opinion of the Circuit Court of Appeals is reported in 53 Fed (2nd) 27, and is printed at page 200 of the Record.

Statement of the Case.

This is a suit in equity brought by the petitioner to adjudicate the title of a forty-acre oil lease, known as the Bilyou lease, and for an accounting for the oil proceeds realized therefrom (R. 3). The petitioner seeks this relief as trustee

of a "business trust", designated the "Mike Lyvers Syndicate" (R. 16). The bill was originally filed in a state court of Arkansas against the Natural Gas and Fuel Corporation, to which the present respondent is successor in interest. The cause was later removed to the Federal Court of the Western District of Arkansas (R. 15).

On a motion to dismiss the complaint, the District Court rendered a judgment on the complaint and its exhibits dismissing the complaint on the ground that it failed to state a cause of action. An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit and the judgment of the District Court was reversed (35 Fed. (2nd) 462).

At this stage of the litigation, the Arkansas Natural Gas Corporation, the present respondent, was substituted for the Natural Gas and Fuel Corporation (R. 49); and, for the first time, an answer was filed to the petitioner's complaint (R. 88). Pleaded, among others, were the defenses of *res adjudicata* and laches. *Res adjudicata* was based on two separate proceedings in which title to this lease was tried before a Referee in bankruptcy: (1) the intervention of petitioner's predecessor trustee, Mike Lyvers, and (2) the intervention of one Zug and two other unitholders or *cestuis que trustent*, suing, in a class action, for themselves and all others beneficially interested. In each proceeding the Referee adjudicated that title to the Bilyou lease was in the Trustee in Bankruptcy through whom the respondent now holds (R. 32, 82). The order of the Referee in the first intervention was affirmed by the District Court (R. 34). In the second proceeding, no review of the Referee's decision by the District Court was even sought by the unitholders.

Upon joinder of issues, the District Court proceeded to hear the case on the merits; many witnesses were heard; and

voluminous evidence introduced (R. 91). On the full and complete record, the District Court dismissed the complaint on the merits, making certain findings of fact and conclusions of law (R. 124). In substance, the District Court concluded: (1) that the summary order of the Referee, and its affirmance on review, constituted a judgment binding upon Mike Lyvers, as Trustee of Mike Lyvers Syndicate and on the petitioner, his successor trustee; (2) that the denial by the Referee of the petition of Zug, *et al.*, on behalf of themselves and all other unitholders of the Mike Lyvers Syndicate, was a judgment binding not only upon Zug *et al.* but also upon all other unitholders and the petitioner; and (3) that Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, and petitioner, as successor trustee, and the unitholders of the Mike Lyvers Syndicate were guilty of laches in asserting their claims to the Bilyou lease (R. 123-124).

On appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment of the District Court was unanimously affirmed (R. 200-221). The Circuit Court of Appeals rested its decision on the ground that the question of title was *res adjudicata* by virtue of the decision of the Referee in Bankruptcy, as affirmed by the District Court, in the Mike Lyvers intervention (R. 205). In view of this determination, the Court found it unnecessary to consider the plea of *res adjudicata* with respect to the petition of Zug *et al.*, or to decide the question of laches. Upon denial of his motion for rehearing (R. 228), the petitioner then applied to this Court for a writ of certiorari invoking jurisdiction under Section 248 of the Judicial Code as amended by Act of February 13, 1925, c. 229; 43 Stat. 936, 938. On March 21, 1932, this Court granted the writ of certiorari (R. 233).

Facts.

For the convenience of this Court the facts as found by the District Court and affirmed by the Circuit Court of Appeals in its opinion are here set forth with Record references.

The Mike Lyvers Syndicate was promoted and organized by Harry N. Morris, David Morris and Otto Morris, promoters who operated in the vicinity of Eldorado, Arkansas (R. 135, 136). Employed by them as a laborer was one Mike Lyvers, an inexperienced youth about twenty-one years of age (R. 136, 139, 140). Use was made of his name to designate this new Syndicate, and he was appointed Trustee under a declaration of trust of February 21, 1923 (R. 16, 129). Beneficial interests in the trust were sold in units of ten dollars each, and 14,400 of such units were ultimately distributed to the public (R. 126). By the provisions of the declaration the Trustee was given full and complete and absolute powers to manage, control and operate the affairs of the trust and its properties (R. 22, 23, 25). It was provided that complete legal title to such properties which might thereafter be acquired would be vested in Mike Lyvers, as Trustee (R. 22). Absolute power was given to Lyvers to dispose of the trust property as he saw fit; and to merge the trust on such terms and under such conditions as he desired—these powers to be exercised without the consent or even the knowledge of the unitholders (R. 25). To him also was given the power to appoint his successor trustee (R. 23). For compensation the Trustee was to receive 25% of the profits (R. 24).

The Mike Lyvers Syndicate was but one of several projects promoted and administered by the Morrises, the dominant

enterprise being a similar business trust called the Harry Morris Guaranteed Gusher Syndicate No. 3 (hereinafter referred to as Gusher Syndicate), of which Harry N. Morris was Trustee (R. 135, 136). From the time of its creation, the Lyvers Syndicate, its money and properties were administered by the Morrises in connection with the affairs of the Gusher Syndicate (R. 135, 136). Mike Lyvers had nothing to do with the actual management of the affairs of the Mike Lyvers Syndicate or with the conduct of its operations in the field (R. 136, 139, 140). By power of attorney he had given one of the Morrises full authority to act for him as Trustee (R. 137). Two of the Morrises were vested with power to check on the Mike Lyvers Syndicate bank account (R. 138). In Lyvers own words, his "signature was not even good at the bank" (R. 141). Not until after the receivership did Mike Lyvers even file with the bank a signature card of his own (R. 139). The properties of the Gusher Syndicate, the Morris Drilling Company and those standing in the name of Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, were managed and conducted as a unit by Harry N. Morris, Otto Morris and Dave Morris (R. 136). Mike Lyvers all the while was working solely on a salary basis for the Morrises (R. 136, 140, 141, 142, 144). Even the prospective 25% profits which would accrue to him as Trustee was to go to the Morrises (R. 141).

During the entire life of the Lyvers Trust there was a commingling of assets of the Mike Lyvers Syndicate and the Gusher Syndicate. Bills for the operation of all the producing properties in the name of Mike Lyvers, Trustee, were paid by the checks of the Gusher Syndicate and of the Morris Drilling Company (R. 135, 136, 139, 140). No credit was extended to Mike Lyvers, as Trustee, by the various concerns

furnishing supplies for the operation of the Mike Lyvers Syndicate properties—the Lyvers Trust not being known to those who furnished material, labor or other credits for field operations. In fact the Assistant Production Foreman for the Morrises and the man in charge of buying the materials for the leases, including those standing in the name of Mike Lyvers, Trustee, never charged anything to Mike Lyvers Syndicate and never knew that Mike Lyvers was a Trustee of those properties (R. 139).

Among the properties eventually standing in the name of Mike Lyvers, Trustee, were the Bilyou, Jonette and Mullens leases (R. 144). The Jonette and Mullens leases were oil producing properties. The Bilyou was a rank "wildcat" lease (R. 146), assigned to Mike Lyvers, Trustee, by Otto Morris, 20 acres on April 4, 1923, and the remaining 20 acres on July 2, 1923 (R. 26, 28). The Bilyou lease was acquired by Morris from C. H. Murphy, who retained an overriding royalty of $32,000 to be paid in oil (R. 131). Murphy had acquired the Bilyou lease through mesne conveyances from J. A. Bilyou and wife, who retained the customary one-eighth royalty (R. 131).

By the end of August, 1923, the Morrises and their projects were in serious difficulties. At the suit of creditors, a receiver, one L. H. Williford, was appointed for the Gusher Syndicate by order of the Chancery Court of Union County, Arkansas (R. 141). On August 28, 1923, Williford took possession and endeavored to unsnarl the tangled affairs of the syndicates (R. 142). The account books were never found (R. 142, 143). The papers which he did find plainly showed that the properties of the Mike Lyvers Syndicate and the Gusher Syndicate had been intermingled, and operated as a unit. In order to work out justice to the creditors, he

concluded that the properties of the Lyvers Syndicate should come under his receivership. Mike Lyvers promised to turn over to him as receiver all the property standing in his name as Trustee, and thereafter did execute to Williford, as receiver, a quitclaim deed conveying the Mullens lease (R. 142). His promise to assign the other properties was not carried out (R. 142). In order to meet the claims of creditors, Williford planned a sale of all the Morris properties, including the Bilyou lease. In early September Harry N. Morris, Otto Morris and Mike Lyvers were indicted for conspiracy to defraud the unitholders in the promotion of the Mike Lyvers Syndicate. In October, Lyvers pleaded guilty, and the sentence imposed was a fine (R. 117).

Certain unitholders having learned of the State Receivership, evolved a reorganization plan for the purpose of paying off the creditors and reacquiring all of the Morris properties, for the benefit of all the unitholders interested in the various Morris syndicates (R. 155, 156). Accordingly, a reorganization committee of unitholders in the Morris syndicates was formed. This committee engaged one Dr. McComb to effectuate a plan (R. 155, 156).

To prevent the sale of the Morris properties by Williford, the several members of the reorganization committee filed, on November 23, 1923, an involuntary petition in bankruptcy (R. 159, 187), and on December 24, 1923 (R. 187), the Gusher Syndicate was adjudicated a bankrupt by the District Court of the Western District of Arkansas. Harry N. Morris, on voluntary petition, was adjudicated a bankrupt the latter part of December (R. 187). Both bankruptcy proceedings were referred to a Referee, who consolidated them. One H. M. Barney, who in November had been appointed Receiver

for the Gusher Syndicate, was elected on January 8, 1924, Trustee in Bankruptcy for the Gusher Syndicate and Harry N. Morris, bankrupts (R. 142, 187).

Upon his appointment in November, as Receiver in Bankruptcy, Barney took possession of all the properties in the custody of Williford, the State Receiver (R. 142). He proceeded to take actual possession, so far as possible, of the properties of the "Morris" syndicates, including those of the Mike Lyvers Syndicate (R. 142, 143). In the case of producing properties he took over their operation (R. 144); and in the case of non-producing properties he took possession by going on each lease and posting placards with inscriptions to the effect that the property was in the possession of H. M. Barney, as Trustee, of the Federal District Court of Texarkana Division sitting in bankruptcy (R. 143).

The Bilyou lease at the time was an unexplored and non-producing lease (R. 143). Barney entered upon the Bilyou farm and set up placards as notices of his possession. The Jonette and Mullens leases, also properties standing in the name of Mike Lyvers, Trustee, for the Mike Lyvers Syndicate, were taken over and operated by Barney (R. 144). When the annual lease rental fell due on the Bilyou lease, Barney, then Trustee in Bankruptcy, paid it (R. 147, 151).

In February, 1924, Mike Lyvers filed an intervention before the Referee in Bankruptcy in which he alleged that Barney, the Trustee in Bankruptcy, had taken *possession* of and was administering certain property belonging to him. The prayer of the intervention was that the Trustee in Bankruptcy be required to turn over to Lyvers all the producing properties belonging to the latter, and that the Trustee be restrained from selling any of the properties (R. 31). At-

tached to the intervention was an exhibit containing a list of the properties claimed by Lyvers, which list included the Bilyou lease. These leases, including the Bilyou lease, were described specifically. In the following and concluding paragraph appeared the significant words, praying for the return of "any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers, Trustee, in Union and Ouachata Counties, Arkansas" (R. 32).

On February 15, 1924, the Trustee in Bankruptcy filed a response to the intervention, admitting possession of the property claiming it as property of the bankrupt estate, and denying the claims of the intervenor (R. 59, 155). On the same day the Trustee in Bankruptcy also filed a counter-petition for a summary order requiring Lyvers to execute a quitclaim deed conveying the leases to him as Trustee in Bankruptcy (R. 60). The Bilyou lease in the counter-petition was fully described as one of the properties for which a quitclaim deed was sought. The allegations of the counter-petition were that the leases in question were purchased with the moneys and assets of the bankrupt estate and that, although they were taken in the name of Mike Lyvers, he only held them as Trustee for the benefit of the bankrupt estate; that Lyvers had no funds with which to pay for said leases and did not pay for them; that Lyvers at the time was in the employ of Harry Morris as Trustee for the Gusher Syndicate; and that the assigning of the lease to Mike Lyvers was a violation of trust by Morris under his declaration of trust (R. 60, 61, 155).

The intervenor appeared by attorneys who examined all witnesses (R. 33). After the hearing had progressed and testimony taken, the intervenor sought to withdraw on his own motion to dismiss. This motion was denied (R. 32).

Testimony was taken by the Referee in Bankruptcy concerning the matters set forth in the petition, the response thereto and the counter-petition for a summary order (R. 33).

With respect to the principal question presented on the intervention, the Referee ruled that the intervention should be denied on the ground that all the property claimed by Lyvers was purchased by funds of the bankrupt Gusher Syndicate derived from the sale of units in the trust estate of that Syndicate, and that these leases were merely being held by Lyvers, who had no interest in them otherwise, for the benefit of the bankrupt estate. The Referee found and recited in his order that the promoters of the Syndicate had handled all of the properties in the names of the various Syndicates for their own convenience; that the properties all belonged to a common fund; and that the assets could not be segregated, being badly commingled and hard to trace, due to the absence of the books of the various Syndicates, including those of the bankrupt (R. 32, 131).

On petition to the District Court, the order was affirmed requiring Lyvers to convey by quitclaim deed the properties in question to Barney, as Trustee in Bankruptcy (R. 34, 35). Accordingly, a quitclaim deed was executed on October 13, 1924, by Mike Lyvers personally and as Trustee for Mike Lyvers Syndicate, conveying the properties, including the Bilyou lease, to Barney as Trustee in Bankruptcy (R. 40).

On January 27, 1925, the Trustee in Bankruptcy entered into a written contract with Natural Gas and Petroleum Corporation to sell for the consideration of $125,000 the remaining properties in the Trustee's hands, the Bilyou lease being one of them (R. 145). This contract was approved by the Referee and duly recorded (R. 146). At the time of the execution of the contract the Bilyou lease was unexplored.

The Trustee had been unsuccessful in his efforts to sell it because its value was purely speculative and because it was burdened with an overriding royalty of $32,000 in oil. His best offer for it had come from C. H. Murphy, the owner of the overriding royalty, who had offered $1,000 for the lease. This offer the Trustee, though authorized to accept, refused (R. 146).

Under the terms of the contract, the Natural Gas and Petroleum Corporation was given thirty days in which to examine title to the various properties (R. 145, 146). In examining the title to the Bilyou lease the purchaser's attorney discovered a misdescription in the prior quitclaim deed of October 13, 1924, given by Mike Lyvers as Trustee, for the Mike Lyvers Syndicate, to the Trustee in Bankruptcy (R. 40, 41). In that quitclaim deed the Bilyou lease had been misdescribed as being in Section 9, Township *15* South, Range *16* West, Union County, Arkansas (R. 41), when, as a matter of fact, the land covered by the lease was located in Section 9, Township *16* South, Range *15* West (R. 151). Accordingly, the Trustee in Bankruptcy obtained the execution of a second quitclaim deed by Mike Lyvers as Trustee of the Mike Lyvers Syndicate, correctly describing and conveying the Bilyou lease to H. M. Barney, as Trustee in Bankruptcy, for the Gusher Syndicate, and Harry N. Morris, bankrupts. The deed was executed, acknowledged and recorded in Union County, Arkansas, February 20, 1925 (R. 149, 150, 151).

On March 2, 1925, the Natural Gas and Petroleum Corporation paid the balance of the purchase price making the entire money consideration $125,000, and a deed of assignment, conveying all the properties, including the Bilyou lease,

was executed by H. M. Barney, as Trustee in Bankruptcy, to the Natural Gas and Petroleum Corporation (R. 43, 149).

During all this time the Reorganization Committee of the unitholders was busy trying to save the situation (R. 156-160). The plan evolved by the Reorganization Committee was to organize a corporation called the Moco Oil Corporation, and to obtain an exchange of shares in the Corporation for the units held by the unitholders of the several Morris Syndicates, including the Mike Lyvers and Gusher Syndicates (R. 160). The ultimate purpose, of course, was to raise money by a subsequent bond issue to purchase, for the benefit of all unitholders, the best of the properties held by the trustee in Bankruptcy. Wide publicity was given to this plan (R. 160).

From November, 1923, to April, 1924, the unitholders of all the Morris properties, including the Mike Lyvers Syndicate, were circularized with notices calling for meetings in various strategic points in the country. Dr. McComb was personally present at about sixteen of these meetings, all held in different cities of the United States (R. 156, 157). By his efforts and those of others, the unitholders were advised of the situation existing in Arkansas; and notice was brought home to the unitholders of the Mike Lyvers Syndicate that the properties of that Syndicate were being administered in the Bankruptcy Court, together with the properties of the other Syndicates (R. 156, 157, 158).

In January, 1924, the Reorganization Committee mailed out to all the unitholders, including those of the Mike Lyvers Syndicate, a form of proof of claim in bankruptcy to be used by the unitholders in filing their claims as creditors in the matter of the Gusher Syndicate and Harry N. Morris,

bankrupts (R. 158). Dr. McComb had obtained and compiled a list of the unitholders of Mike Lyvers Syndicate and of the Gusher Syndicate, duplicates of those on file in the Bankruptcy Court (R. 126, 152, 156).

In April, 1924, the Reorganization Committee organized, as planned, the Moco Oil Corporation (R. 157). A newspaper called the *Moco News* was mailed each month from May, 1924 up to and including April, 1925, to every unitholder whose name appeared on the list of the Gusher and Lyvers Syndicates for the purpose of keeping the unitholders advised concerning developments (R. 157). The Moco Oil Corporation also mailed a letter to all unitholders stating that it was formed for the purpose of acquiring the "Morris properties" from the Trustee in Bankruptcy (R. 160). The letter expressly stated that "Only Morris, Boone and Lyvers unitholders can share in these properties" (R. 160). A substantial majority of the unitholders of the Lyvers Syndicate executed powers of attorney framed to empower Dr. McComb to represent the unitholders and act in all matters pertaining to the properties of the Lyvers Syndicate (R. 158, 159).

In an issue of the November, 1924, *Moco News*, Dr. McComb listed all of the properties that the Moco Oil Corporation had already purchased from the Trustee in Bankruptcy and listed also the properties which he expected to buy from him. Knowledge of the fact that the Trustee in Bankruptcy had taken possession of the Bilyou lease was brought home to the unitholders of the Mike Lyvers Syndicate by the fact that among the properties to be purchased was listed the lease here in controversy, described as "J. A. Bilyou Farm Northwest ¼ Northwest ¼ 9-6-16-15 Union County, Arkansas" (R. 159).

In October 1924 the Referee in Bankruptcy mailed to each unitholder, including the Lyvers unitholders, a card notifying them to file their claims in bankruptcy as deferred creditors of the estate (R. 58, 152). By January 1, 1925, unitholders representing more than 10,000 units of the Mike Lyvers Syndicate, or more than 5/7ths of all the units issued, came in and filed their claims as deferred creditors in the bankruptcy proceedings. All of these claims were allowed and a dividend was paid on each of them (R. 147). Thereafter, from time to time, the Referee mailed out to all the unitholders, including those of the Lyvers Syndicate, other notices of the progress of the bankruptcy proceeding (R. 153, 154).

On February 12, 1925, Dr. McComb caused a petition to be filed on behalf of the Moco Oil Corporation to restrain the Trustee in Bankruptcy from selling the "Morris properties" to the Natural Gas and Petroleum Corporation until the Moco Oil Corporation had a reasonable opportunity to raise $155,000 for its purchase, and prayed in the alternative that the contract between the Trustee in Bankruptcy and the Natural Gas and Petroleum Corporation be set aside (R. 160, 161). Simultaneously the Moco Oil Corporation mailed to each of the unitholders, including the Lyvers unitholders, a full copy of the petition (R. 160, 161).

On March 18, 1925, at the instance of Dr. McComb, a petition was filed by one Zug and two other unitholders of the Mike Lyvers Syndicate to set aside the sale of the Bilyou lease to the Natural Gas & Petroleum Corporation, on the ground that it was the property of the Mike Lyvers Syndicate and in no way the property of the Gusher Syndicate and Harry N. Morris, bankrupts; and in the alternative, for an accounting of the moneys in the hands of the Trustee in

Bankruptcy, which represented the proceeds of sale of the Bilyou lease, the Mullens lease, and the Jonette lease (R. 62, 154, 155). The petitioners alleged that they were filing the petition as a class proceeding, on behalf of themselves and all other unitholders of the Mike Lyvers Syndicate. A response was filed by the Trustee in Bankruptcy; and upon the submission of the matter to the Referee the petition was denied (R. 72, 82, 155). The petitioning unitholders sought no review of this order by the District Court. In the April 1925 issue of the *Moco News* there appeared an account of the proceedings relating to the Zug *et al.* petition. This issue was mailed to all the unitholders, including those of the Mike Lyvers Syndicate (R. 162, 163).

Interest at this time centered upon the Bilyou lease for the reason that deep oil had recently been discovered in the Smackover field. Although none of the discovery wells were in the immediate vicinity of the Bilyou lease, they had affected its speculative value (R. 187). At the trial it was proved that on March 12, 1925, the Bilyou lease had a value of about $6,000 over and above the oil payment charge of $32,000, which was against it (R. 186). The first well drilled upon the Bilyou lease was completed on April 18, 1925, and proved to be a gas well. Four other wells were drilled, three of them completed as producing oil wells in the early part of May, the fourth never being completed (R. 182). The expenses incurred in the development and operation of the Bilyou lease from March 1925 to January 1928 approximate $221,000 (R. 184, 185). The estimated value of the Bilyou lease as of May 10, 1925, was between $600,000 and $800,000 (R. 185-188).

Late in the summer of 1925 Dr. McComb, desiring to institute suit against the Natural Gas and Petroleum Corpora-

tion to recover the property of Mike Lyvers Syndicate, including the Bilyou lease, held several conferences with Mike Lyvers, at which he sought to get Lyvers to resign and appoint him, McComb, as his succesor Trustee for Mike Lyvers Syndicate (R. 163). Though fully empowered to do so, Lyvers refused to appoint Dr. McComb (R. 163, 164). In October, however, Mike Lyvers executed an instrument by which he purported to resign as Trustee of Mike Lyvers Syndicate and to appoint John H. Page his successor Trustee (R. 130).

On October 19, 1926, suit was brought in the District Court of the Eastern District of Arkansas, which suit was similar to the one at bar. This suit was dismissed on April 18, 1927, for lack of jurisdiction (R. 188). The present suit was instituted on December 20, 1927 (R. 9).

Summary of Argument.

POINT I. The adjudication of title to the Bilyou lease in the intervention of Mike Lyvers in the bankruptcy proceedings in 1924 constitutes *res adjudicata*. The Bankruptcy Court had jurisdiction to try title in summary proceedings: (1) because the property sought to be reclaimed was in the possession of the Trustee in Bankruptcy; and (2) because the adverse claimant consented to summary proceedings by his own intervention. Though Mike Lyvers was not designated as Trustee of the Mike Lyvers Syndicate in the proceedings in the Bankruptcy Court, he, nevertheless, was litigating the same issues and relying upon substantive rights identical with the claims asserted by the petitioner, as successor in title. Lyvers never held any title or claim to the Bilyou lease except as trustee; had never done any

act in relation thereto except as trustee; and had never claimed it as his individual or personal property. At the hearing before the Referee, upon his intervention, it was fully understood that he was claiming as Trustee; and the issue tried was the question of ownership between the bankrupt estate of the Gusher Syndicate, represented by the Trustee in Bankruptcy, on the one hand, and Lyvers as Trustee of the Mike Lyvers Syndicate, on the other. The *cestuis que trustent* were not necessary parties to the bankruptcy proceeding in order to make the decision in that case binding upon the *cestuis* and upon the petitioner, now their representative in the present action. Title to the Mike Lyvers Syndicate properties, including the Bilyou lease, passed by merger to the Gusher Syndicate even before its adjudication in bankruptcy. The equities are with the creditors of both Syndicates and this respondent.

POINT II. The proceedings upon the petition filed by Zug, *et al.*, in a class proceeding for the benefit of all unitholders of the Mike Lyvers Syndicate constitute *res adjudicata*. Jurisdiction was vested in the Bankruptcy Court to hear and determine a petition to set aside a sale of property made by the Trustee in Bankruptcy when the property was then in his possession; and a prayer, in the alternative, for the return of the proceeds of sale in the hands of the Trustee. The issues and subject matter in that proceeding and in this suit are essentially the same. The Referee's order denying the petition was binding upon the unitholders as a class and upon their present representative, the petitioner.

POINT III: The petitioner and the unitholders of the Mike Lyvers Syndicate are estopped by laches to maintain this action. All of the elements of laches are present: (1) the

invasion of the rights (assumed arguendo) of the party claiming to be owner; (2) notice on his part of such invasion; (3) delay in the prosecution of his rights; and (4) circumstances rendering it inequitable to grant the relief prayed for. The invasion, if any, occurred four years before the institution of the instant suit. Both Mike Lyvers and the petitioner, as successor Trustee, had notice of this invasion. The unitholders acquiesced. Indeed, over two-thirds of them had knowledge by the acceptance of dividends on their claims as deferred creditors of the bankrupt estate. This action was not brought until a year and a half after the Bilyou lease had been fully developed into valuable oil property. All the risk of exploration was borne by respondent's predecessor. It would be inequitable to permit the petitioner thus to profit from respondent's capital and enterprise.

ARGUMENT.

Introduction.

The petitioner elects to stand on his brief in support of certiorari. An attempt is there made to create the impression that there has been a lack of unanimity by the Judges who have passed upon the questions here presented. This is not the situation. These essential questions have been unanimously decided by all the courts which have considered them —from the Referee in Bankruptcy and the District Court affirming his order, the District Court which heard this case on the merits, to the Circuit Court of Appeals unanimously affirming the judgment on the merits.

Because the petitioner persistently refers to the decision of the Circuit Court of Appeals passing on the sufficiency of the complaint alone, we feel it incumbent on us to point

out that the issues decided by the Circuit Court of Appeals on that appeal differ distinctly from those decided on the second appeal. The latter issues, quite obviously, are the only ones now before this Court for review.

The Circuit Court of Appeals on the first appeal, reported in 35 Fed. (2nd) 462, had before it the single question whether the facts stated in the bill, if taken as true, showed a cause of action. The bill set forth that the Mike Lyvers Syndicate was a separate and distinct entity; that the Morris Guaranteed Gusher Syndicate No. 3 had no right, title or interest in or to the leases standing in the name of Mike Lyvers Syndicate; that in the intervention proceedings instituted by Mike Lyvers he appeared in his personal capacity only and not as Trustee; and that the order made by the Referee and affirmed by the District Court affected Mike Lyvers in his personal capacity only and not as Trustee. The Circuit Court of Appeals held that a bill alleging these facts was sufficient as a pleading.

The actual facts developed by evidence at the trial disclose a situation entirely different from that presented in the complaint. This both the Courts below fully recognized and so found.

It now appears that Mike Lyvers was Trustee of the Lyvers Syndicate in name only. "The evidence shows that from the time the Lyvers Syndicate was created its moneys and properties were administered by the Morrises in connection with their administration of the affairs of the Gusher Syndicate. Lyvers, as trustee, had no credit extended to him—he was merely a straw man" (53 Fed. (2d) 27, 38). The findings of the Court show beyond question that the Mike Lyvers Syndicate was not a *bona fide* separate entity. "Credit for carrying on the operations of the Lyvers Syndicate was ex-

tended either to the Gusher Syndicate or to the Morrises. Bills for the operation of the producing properties in the name of Mike Lyvers, trustee, were paid by checks of the Gusher Syndicate and of the Morris Drilling Company" (53 Fed. (2nd) 27, 38).

The statement in petitioner's brief (p. 28) to the effect that "The evidence in this case showed that at all times the two Syndicates were separate and distinct, and whatever payments were made by the Morris Syndicate on behalf of the Mike Lyvers Syndicate were repaid by the Mike Lyvers Syndicate" (R. 188, 191) is contrary to the record and the express holdings of the Courts below. With respect to the few repayments made by the Lyvers Syndicate the Circuit Court of Appeals said (53 Fed. (2nd) 38):

> "Some reimbursements were made by the Lyvers Syndicate to the Gusher Syndicate or the Morrises for expenses incurred. However, the checks therefor were drawn by the Morrises themselves."

The testimony of Lyvers taken on an intervention at an earlier date in his claim for back salary due him from the Morrises was to the effect that he was a mere employee; that the Mike Lyvers Syndicate and the Gusher Syndicate were operated as one organization; that he had no interest whatever in the property of the Lyvers Syndicate; and that the property nominally owned by the Mike Lyvers Syndicate was really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3 (R. 140, 141).

Thus an entirely different situation was developed by the evidence introduced at the trial disclosing the real status of Mike Lyvers, as Trustee; the relationships of the Morris brothers and all of their associated syndicates; and the relation of the syndicates, one to another.

The attitude and actions of the unitholders of the Mike Lyvers Syndicate were in the record for the first time. The Circuit Court of Appeals, in its opinion (p. 38), speaks of "the almost complete acquiescence by the unit holders in the administration of the Lyvers property as part of the bankrupt estate"—this no doubt with reference to the fact that unitholders representing more than 10,000 units filed their claims in the Gusher Syndicate bankruptcy proceedings, and also to the fact that from November 23, 1923, when the Committee of the Morris unitholders put the Gusher Syndicate into bankruptcy, to April, 1925, even those unitholders who failed to file their claims were fully informed by communications from the Committee and the Referee in Bankruptcy of the possession and administration of the properties of the Mike Lyvers Syndicate by the Bankruptcy Court (R. 147, 156-163).

Finally, it appears in the record of the trial on the merits that all the parties, Mike Lyvers, Barney, the Trustee in Bankruptcy, Pope, the Referee in Bankruptcy, and the District Court fully understood that the justiciable issue presented in Mike Lyvers' intervention concerned the adjudication of title between the Trustee in Bankruptcy, representing the creditors of the Morris properties, and Mike Lyvers, as Trustee of the Mike Lyvers Syndicate.

POINT I.

The adjudication of title to the Bilyou lease in the intervention of Mike Lyvers in the bankruptcy proceedings constitutes *res adjudicata*. The bankruptcy court had jurisdiction to try title; because the property was in the possession of the Trustee in Bankruptcy; and because the adverse claimant consented to summary proceedings by his intervention. The issue of title tried upon the intervention was actually between Mike Lyvers as Trustee of the Mike Lyvers Syndicate and Barney, Trustee of the Bankrupt Estate.

A.

SUMMARY JURISDICTION OF THE BANKRUPTCY COURT.

(1) *Possession of the Bilyou lease was in the Trustee in Bankruptcy.*

The District Court found as a fact that possession of the Bilyou lease was taken in November, 1923, by Barney, then Receiver, and later Trustee in Bankruptcy (R. 120). The Circuit Court of Appeals held that this finding was supported by the evidence (53 Fed. (2nd) 27, 35).

Upon his appointment as Receiver of the Bankrupt's estate, Barney immediately took over the properties standing in the name of the Mike Lyvers Syndicate (R. 142). He operated the Jonette and Mullens leases which were then producing

oil (R. 144). See *In re Hoover-McClintock Motor Car Co.*, 1 Fed. (2nd) 660, 661, wherein the Court said:

> "Possession of any material part of the *res* gave the referee jurisdiction to determine the validity of the deed of trust affecting such property".

Barney also entered upon the forty-acre Bilyou tract and posted it with placards stating that it was in his possession as Receiver in Bankruptcy (R. 143). The Bilyou lease had never been drilled. It was vacant and unexplored. Barney as Trustee in Bankruptcy drilled no wells on it. But he did all that was humanly possible, short of actual drilling, to exercise dominion over the lease. He asserted title to all of the properties standing in the name of Mike Lyvers as Trustee. He paid the annual lease rental for the Bilyou lease when it fell due in order to keep the lease as an asset of the bankrupt estate.

We respectfully submit that the rule stated by the Circuit Court of Appeals applies here:

> " 'Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof; but some notorious act, as nearly equivalent to actual seizure as practicable must be substituted, and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the court.' " [53 F. (2nd) 27, 35.]

See also *O'Dell* v. *Boyden*, 150 Fed. 731; *In re Cochran*, 40 Fed. (2nd) 282, 284; *In re Jones*, 42 Fed. (2nd) 269.

The intervening petition by Mike Lyvers in the bankruptcy proceedings contained an admission of possession by the trustee in bankruptcy (R. 31). The unitholders, individually,

and through the acts of their Committee, fully recognized this possession (R. 147, 156-159).

In his intervention, Lyvers claimed title to all other properties standing in the name of Mike Lyvers Syndicate and Mike Lyvers, Trustee (R. 32). The purpose of the intervention was to litigate the adverse claims of Lyvers, Trustee, to the properties of the Lyvers Syndicate. These included the producing Jonette and Mullens leases which at the time were being operated by the Trustee in Bankruptcy (R. 144). Jurisdiction of the Bankruptcy Court over the producing leases cannot be challenged. For the purposes of said intervention, we respectfully submit that the Referee likewise had summary jurisdiction over leases not operated, but posted with notices of the entry, claim of title and possession by the Trustee in Bankruptcy.

Possession by a Trustee in Bankruptcy is sufficient to confer upon a Court of Bankruptcy the power to proceed by summary proceedings and that possession may be either actual or constructive. *Taubell, etc.,* v. *Fox,* 264 U. S. 426, 432; *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Priest* v. *Weaver* (C. C. A. 8th), 43 Fed. (2nd) 57, 59; *Jack Stolkin, Inc.* (C. C. A. 2nd), 42 Fed. (2nd) 829; *In re Midland Oil Co.* (C. C. A. 5th), 3 Fed. (2nd) 112, 113; *Orinoco Iron Co.* v. *Metzel* (C. C. A. 6th), 230 Fed. 40, 44.

(2) *Consent to Summary Proceedings.*

In addition to the jurisdictional fact of possession, which alone empowered the Referee to proceed summarily, jurisdiction was also vested in the Bankruptcy Court by the filing of the Lyvers intervention. Submission of a controversy to the Bankruptcy Court is an invitation to it to exercise its

jurisdiction and amounts to a consent to summary jurisdiction. *Bryan* v. *Bernheimer,* 181 U. S. 188, 197; *Harrison* v. *Chamberlain,* 271 U. S. 191, 193; *Taubell et al. Co.* v. *Fox,* 264 U. S. 426, 432; *May* v. *Henderson,* 268 U. S. 111, 116; *Whitney* v. *Barrett,* 28 Fed. (2nd) 760, 761 (C. C. A. 5th); *Board of Education of Salt Lake City* v. *Leary,* 236 Fed. 521 (C. C. A. 8th); *Gamble* v. *Daniel,* 39 Fed. (2nd) 447, 453 (C. C. A. 8th); *In re Rochford,* 124 Fed. 182, 186 (C. C. A. 8th); 5 Remington on Bankruptcy; Section 2195, page 280.

Jurisdiction of the Court was not ousted by the motion of Lyvers to withdraw his petition, after the proceedings and hearings had begun, and after affirmative relief had been asked by the Trustee in Bankruptcy in a counter-petition seeking the execution of a quitclaim deed (R. 34). Attorneys representing the intervenor appeared throughout the hearings before the Referee in Bankruptcy (R. 33). The objections to the form of the proceedings came too late. *In re Hopkins,* 229 Fed. 378, 380 (C. C. A. 2nd); *Cf. Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91.

The recent case of *Daniel* v. *Guaranty Trust Company* (decided by this Court on March 14, 1932), is to be distinguished from the present case. In the first place, the funds there sought by the turnover order were in the possession of the adverse claimant and not the Trustee in Bankruptcy, as in the instant case. In the second place, the intervenor had petitioned for the reclamation of designated bonds, and the affirmative relief sought by the Trustee in Bankruptcy was directed to an entirely different *res,* namely, the funds in the possession of the Guaranty Trust Company; whereas, in the instant case, the affirmative relief sought by the Trustee related to the very property which the interventor in his own petition sought to recover.

The instant case is also to be distinguished from *McDonald v. Plymouth County Trust Company* (No. 714, October Term, 1931), now before this Court on certiorari. In that case the Trustee in Bankruptcy was the moving party who filed a petition with the Referee alleging that the adverse claimant had applied certain funds of the bankrupt on deposit with it to a demand note of the bankrupt held by it, with knowledge at the time, that the bankrupt was then insolvent; and that such application constituted a preference. Without filing an answer to the petition, the adverse claimant appeared at a hearing before the Referee, denied the facts set forth in the petition, and claimed the right to apply the funds on deposit with it to its debt. An issue was thus raised properly determinable, so the Circuit Court of Appeals held, in a plenary suit. The Court found that the adverse claimant refused to submit to summary proceedings before the Referee; and that his only consent to a proceeding before the Referee was on the condition that the controversy be conducted as a plenary suit. The Circuit Court of Appeals held that jurisdiction to entertain plenary suits could not be conferred upon a Referee in Bankruptcy by consent of the parties. In the case at bar, however, the intervenor invoked the jurisdiction of the Bankruptcy Court and consented to summary, not plenary, proceedings. It should be noted moreover, that in the *Plymouth* case the adverse claimant, not the Trustee in Bankruptcy was in possession of the moneys in controversy.

B.

THE ISSUE OF TITLE TO THE BILYOU LEASE TRIED UPON THE INTERVENTION OF LYVERS WAS ACTUALLY BETWEEN MIKE LYVERS AS TRUSTEE OF THE MIKE LYVERS SYNDICATE AND BARNEY, TRUSTEE OF THE BANKRUPT ESTATE.

Though Mike Lyvers was not designated as Trustee of the Mike Lyvers Syndicate in the proceedings in the Bankruptcy Court, he, nevertheless, was litigating the same issues and relying upon substantive rights identical with the claims now asserted by the petitioner, his successor in title. This is disclosed by an examination of the record in the bankruptcy proceedings and by a review of the extrinsic evidence introduced in the trial of the present action.

Whether a prior adjudication is *res adjudicata* of issues involved in a subsequent proceeding is to be determined by an examination of the entire record in the earlier action; and, where necessary, extrinsic evidence is admissible to show the precise questions before the Court. Thus it was stated by this Court in *Russell* v. *Place*, 94 U. S. 606, 608:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a

> new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

See also *Oklahoma* v. *Texas*, 256 U. S. 70, 88.

The only title that Mike Lyvers ever had to the Bilyou lease was the title acquired by him as Trustee for the Mike Lyvers Syndicate through the two conveyances executed to him by one of the Morrises (R. 141). The consideration running from Otto Morris to Mike Lyvers, Trustee, recites payment of $1.00 and other good and valuable considerations (R. 27, 29). He never individually acquired the lease in question and never pretended to hold it in any other capacity than as Trustee of the Mike Lyvers Syndicate. The record discloses that he never personally owned any oil leases (R. 140, 141).

In an earlier intervention before the Referee claiming salary due him from the Morrises, Mike Lyvers himself testified that he had no interest in the properties of the Lyvers Syndicate, except as nominal trustee (R. 140, 141). In the light of this evidence it is inconceivable that Mike Lyvers was asserting rights in his individual capacity when he intervened to reclaim the Bilyou lease. This is further supported by the last paragraph in Exhibit "A" to his petition of intervention where, included in the list of properties to be reclaimed, are the Bilyou lease "and any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers Trustee in Union and Ouachita Counties, Arkansas" (R. 32).

Furthermore, the execution by Lyvers as Trustee of the quitclaim deed of October 13, 1924, and of the correction deed of February 20, 1925, stand as admissions that Lyvers understood that the order of the Bankruptcy Court to execute

the deeds was directed against him in his representative capacity; and that the proceedings before the Referee involved him as Trustee.

Parenthetically it should be noted that the quitclaim deeds were not necessary to vest in the Trustee title to the properties standing in the name of Mike Lyvers Syndicate. Title vested in the Trustee in Bankruptcy by operation of law, even prior to any order or adjudication by the Referee [Bankruptcy Act, Sec. 70(a); U. S. C. A. Tit. 11, § 110]; and, therefore, long before the quitclaim deeds were executed. The proceedings before the Referee, of course, served only to confirm, not vest, title in the Trustee. In these circumstances, the quitclaim deeds could not operate to convey title which the Trustee already had. They were desired and demanded, no doubt, just as any quitclaim deed, to cut off even the possibility of another adverse claim of title. The compelling motive, undoubtedly, was to make the properties more marketable.

Further indication that the parties to the controversy in the Bankruptcy Court were fully aware that the contest was actually between the Trustee in Bankruptcy and the nominal trustee of the Mike Lyvers Syndicate is found in the counter-petition of the Trustee in Bankruptcy. There it alleged (R. 61):

> "* * * the oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate and * * * were taken in the name of Mike Lyvers, but that said Mike Lyvers only took and held as Trustee for the benefit of said trust estate, the bankrupt herein * * * that Mike Lyvers did not pay out and had no funds with which to pay for said leases, but that he at said times was in the employ of Harry Morris as Trustee under the declaration of trust of the assets of this bankrupt estate."

This is recognition of that which was clearly apparent, namely, that the properties of the Lyvers Trust were operated with the moneys of the Gusher Syndicate and on the credit of that Syndicate and of the Morris Drilling Company.

The recitals in the order of the Referee denying intervention are significant (R. 33):

> "All of the property claimed by the intervenors was purchased with the funds of the bankrupt derived from the sale of units in the trust estate of Harry Morris Guaranteed Gusher Syndicate No. 3, the Bankrupt herein, and that the title to the various properties, including the property intervened for and more particularly set out in the various assignments introduced in evidence, was taken in the name of Mike Lyvers, and Otto L. Morris, and also in the name of Mike Lyvers, Trustee in Bankruptcy herein (sic). All of said property was merely held by said parties for the benefit of the bankrupt and they had no interest in same otherwise. They not only handled these properties in this manner but handle (sic) other properties in like manner and in the name of various syndicates for their own convenience. All of the properties belonged to a common fund, although badly commingled and hard to trace owing to the absence of the books of the various syndicates including those of the bankrupt;"

To summarize—the District Court found, and the Circuit Court affirmed: (1) That Lyvers had never held any title or claim to the Bilyou lease except as Trustee; had never done any act in relation thereto except as Trustee; and had never claimed it as his individual or personal property; and (2) that at the hearing before the Referee upon his intervention it was fully understood that he was claiming as Trustee; and the issue tried was the question of ownership of the Lyvers Syndicate properties between the bankrupt

estate of the Gusher Syndicate, on the one hand, and Lyvers, as Trustee of the Lyvers Syndicate, on the other.

It is respectfully submitted that the instant case falls within the well settled rule that a judgment in an action in which a party *in fact* litigates rights pertaining to him in a representative capacity—even though he is not designated as a party in such capacity—is conclusive in a subsequent action involving the identical rights in which the party's representative capacity is properly set out. 2 Black, Judgments (2nd Ed., 1902), Section 536; 1 Freeman, Judgments (5th Ed., 1925) Section 421; Bigelow, Estoppel (6th Ed., 1913), p. 146 and Note 2.

In point is the case of *Daniel* v. *Gum*, 45 S. W. 468 (Tenn. Ch. App. 1897). In 1891, the plaintiff in that action had executed to the defendant a deed of trust on several head of horses and some lumber as security to the defendant and another for certain promissory notes given by the plaintiff. In 1896, the defendant Gum, without designating his capacity as trustee, brought an action of replevin against the plaintiff for the horses and obtained a judgment. Thereafter he advertised the horses for sale, whereupon the plaintiff brought this bill in chancery to enjoin the sale and sought to prove that all of the notes secured by the deed of trust had been paid and that the defendant Gum was not entitled to the security. The Court found as a fact that in the prior action at law Gum, the then plaintiff, claimed a right to the horses, the subject matter of the litigation, solely under the deed of trust to him as trustee, and although the prior action had been brought by Gum, individually, the decision was held *res adjudicata* in the subsequent proceeding in equity. The Court declared:

> "The contest in that case was between John Gum, the trustee in the mortgage, and the present complainant. It is true that in that proceeding he is not styled trustee, but it appears from the case that the right he asserted was under the mortgage, and that right was as trustee. It is immaterial, therefore, in the present case, that he was not formerly entitled 'trustee' in the former case" (45 S. W. at 470).

In cases closely analogous to the present case it has been held that an adjudication in an action in which a trustee is joined as a party solely in an individual capacity, along with his *cestuis,* is a bar to a subsequent action by the trustee in his representative capacity.

In *Linton* v. *Omaha Wholesale Produce Market House Co.,* 218 Fed. 331 (C. C. A. 8th), the rule was laid down by the Court as follows:

> "It is contended by appellant's counsel that, as Adolphus F. Linton was not impleaded in the Becker suit as trustee, but as an individual, in his own right, he cannot be estopped from prosecuting this suit, in which he appears in his capacity as trustee for his children, by the judgment rendered against him in that suit. Here, too, we think the assumption is unfounded. It is true he was not designated in the caption of the Becker suit as a *trustee,* but averments are found throughout the bill in that suit which most clearly disclose that he was there charged with making a claim to the lots in question solely as trustee for his children. It is quite common and altogether proper to describe the capacity of a named defendant or his relationship to other parties in the body of the bill, without disclosing them in the style of the action at all. Not only so, but the defendants in the Becker case pleaded affirmatively that Mr. Linton held title to the lots in question for his children, and the case was tried on that issue. That issue was, therefore, not only made, but fully tried, in the Becker suit" (218 Fed. at 335).

In *Emerson-Brantingham Implement Co.* v. *Riverton Elevator Co.*, 297 Pac. 393 (Wyoming 1931), the Court held that a judgment in an action against certain persons joined individually was *res adjudicata* in a subsequent action involving the same rights and issues in which the persons were joined "as directors" of a corporation.

Numerous examples of this principle have been recognized by the courts. In separate actions, one brought under the Federal Employers Liability Act and another brought under a State Workmen's Compensation Act, a judgment in one action to which the beneficiary of recovery under a State act is a party is *res adjudicata* with respect to an issue there litigated, namely, whether the deceased was engaged in interstate commerce, in a subsequent action under the Federal law in which an administrator is the nominal party on behalf of the same beneficiary. *Chicago, R. I. & Pac. Railway Co.* v. *Schendel*, 270 U. S. 611; *Williams* v. *Southern Pacific Co.*, 54 Cal. App. 571, 202 Pac. 356.

In the *Schendel* case this Court stated:

> "The fact that the party impleaded, under the state law, was the widow, and, under the federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts" (270 U. S. at 618).

In *Williams* v. *Southern Pacific Co.*, the principle was laid down as follows:

> "Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter,

a judgment in the one case is conclusive of his rights in the other" (202 Pac. at 359).

In another application of this general principle, it has often been held that if a party litigates a right derived by descent as heir or next of kin of a decedent in an action in which the party appears in his individual capacity, the adjudication in that action is a bar to a subsequent suit involving the same identical right in which the same person appears as a party in the capacity of administrator or executor of the decedent.

In *Braswell* v. *Hicks*, 106 Georgia 791, 32 S. E. 861, the Court stated:

> "It is a general rule, well recognized by all the courts, that a judgment against a person as an individual will not bind him as administrator. * * * There are, however, certain exceptions to this rule. One of these is that where a person sued as an individual voluntarily pleads in that suit his rights in a representative capacity, as administrator, executor, guardian, or trustee, and the issue thus raised by his plea is passed upon by the court, a judgment in that suit binds him in both capacities, as an individual and as a representative. It is not necessary, in order that the judgment should be so binding, that an order should be taken making him a party in his representative capacity. The fact that he pleads in that capacity, and that the issue so raised by him is passed upon by the court, binds him, without a formal order making him a party in his representative capacity" (32 S. E. at 862).

See also, *Rost* v. *Heyka*, 133 Kan. 292, 299 Pac. 969; *Bowman* v. *Parks*, 166 Iowa 403, 147 N. W. 850; *Wadley* v. *Oertel*, 140 Georgia 326, 78 S. E. 912; *Kansas City, W. & N. W. R. Co.* v. *Menager*, 59 Kan. 687, 54 Pac. 1043; *Colton* v. *Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Manigault* v. *Holmes*, 1 Bailey Eq. 283 (S. C. 1831).

Conversely, if a person litigates an issue in an action to which he is a party as executor or administrator, the adjudication is conclusive in a subsequent action involving the same issue in which the person appears in his individual capacity. In *re Bells' Estate,* 153 Cal. 331, 95 Pac. 372, 377-378; *Brown* v. *Howard,* 92 Fed. 537 (C. C. S. D., Iowa); *Donifelser* v. *Heyl,* 7 Kan. App. 606, 52 Pac. 468, aff'd 59 Kan. 779, 54 Pac. 1059.

So also the English Courts have held that in an action in which a person appears claiming rights as next of kin of the decedent, an adjudication therein is conclusive of the same issue in an action in which the person appears as heir of the decedent. *Beardsley* v. *Beardsley* (1899) 1 Q. B. 746.

Similarly this Court has held that a decision in an action where certain persons appeared as executors was conclusive of a subsequent action against those persons as trustees; in respect of an identical issue involving a testamentary trust. *Colt* v. *Colt,* 111 U. S. 566.

Though Lyvers may not have been formally and technically designated in the intervention as Trustee, and may not have been formally referred to as Trustee in the order of the Referee, yet, inasmuch as the proceeding was actually and necessarily prosecuted by him in his representative capacity, and was so treated, the order of the Referee and of the District Court affirming it became binding upon him as Trustee and should now be treated as binding upon the appellant as his successor.

The *cestuis que trustent* of the oil and gas leases held in the name of Lyvers, as Trustee for the Syndicate, were not necessary parties to the prior action in bankruptcy in order

to make the decision in that case binding upon the *cestuis* and upon the petitioner, now their representative, in the present action. 1 Freeman, Judgments (5th Ed., 1925) Section 500; Bigelow, Estoppel (6th Ed., 1913) p. 127.

It has been repeatedly held by this Court that a judgment in an action in which the Trustee litigates and represents the equitable rights of the *cestuis* is a conclusive adjudication of the rights of the *cestuis* and is a bar to any subsequent action by them or upon their behalf in respect of the same issues. *Beals* v. *Illinois, Mo. & Texas R. R. Co.*, 133 U. S. 290; *Richter* v. *Jerome*, 123 U. S. 233; *Shaw* v. *Railroad Co.*, 100 U. S. 605; *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741; *Kerrison* v. *Stewart*, 93 U. S. 155.

Similarly it has been held that the *cestuis* are not necessary parties to an action in which their trustee is joined as representative of their rights. *Vetterlein* v. *Barnes*, 124 U. S. 169; *Mathis* v. *Hemingway*, 24 Fed. (2d) 951 (C. C. A. 8th); *Woods* v. *Woodson*, 100 Fed. 515 (C. C. A. 8th); compare *Heckman* v. *U. S.*, 224 U. S. 413 (Indians represented by United States not necessary parties to action).

We further submit that the Bankruptcy Court correctly decided that title to all the Lyvers Syndicate properties, including the Bilyou lease, was in the bankrupt estate and therefore passed upon adjudication in bankruptcy to H. M. Barney, Receiver and Trustee in Bankruptcy. This for the reason that prior to the adjudication of bankruptcy of the Gusher Syndicate and Harry N. Morris, all such properties had passed by merger into the ownership of the Gusher Syndicate. Any creditor of the Gusher Syndicate could have

subjected to the payment of his claim the leases held in the name of Mike Lyvers as Trustee.

All that was originally done by the Trustee in Bankruptcy was done in recognition of and as a result of this merger. Assets nominally belonging to the Lyvers Syndicate were administered and liquidated as properties of the Gusher Syndicate for the purpose of meeting the demands of creditors whose claims had been incurred in the name of the Gusher Syndicate during the course of and as a part of the merger (R. 144).

The Referee in Bankruptcy recognized the merger by the payment of the debts of the Mike Lyvers Syndicate upon an equal basis with the debts of the Gusher Syndicate; and by the distribution of dividends to the unitholders of the Lyvers Syndicate, as deferred creditors, upon an equal pro rata basis with those of the Gusher Syndicate (R. 148).

At least five-sevenths of the unitholders of the Lyvers Syndicate sanctioned this merger *nunc pro tunc,* if not before, by acquiescence in the course of the bankruptcy proceedings and the acceptance of the bankruptcy dividends (R. 147, 156-159).

The petitioner here contends that there could be no merger of the syndicate without legal proceedings (Br. 28). Just what legal proceedings would be necessary he does not specify. No formal proceedings of any kind were required by the declaration of trust or by statute. Article XVIII, Section 1 of the trust (R. 25) expressly provides:

> "The Trustee herein named and all successors Trustee may, in his discretion, terminate this trust by merger or reorganization in any manner or form whatsoever, and nothing herein shall be deemed to construe as a limitation or restriction upon such power or authority of the Trustee * * *" (sic).

Neither consent nor even notice was required to be given to the unitholders to effect such a merger. The Trustee could accomplish a merger in any practical matter that he saw fit. And a merger will result from any conduct of the Trustee, which, as here, has the practical effect to consolidate and unify the affairs and properties in his name, as Trustee, with the affairs and properties of any similar syndicate. In respect of the merger the Circuit Court of Appeals said:

> "The trustee is given the right under this article to terminate the trust by merger *in any manner or form* whatsoever, and nothing is to be construed as a limitation upon his power in that respect. No formal proceedings are necessary and if the conduct of the trustee is such that the result is to unite the trust with another trust we see no reason why this article is not sufficient to cover that situation and permit a court to say that Lyvers had merged his syndicate with the Gusher Syndicate. He turned over all power of control and management of the Lyvers Syndicate to the Morrises; he gave one of them authority to issue checks; he allowed, if he did not actively assist in, intermingling the property of the two trusts and confusing their affairs so that they could not be unscrambled.
>
> This would seem to constitute merger 'in any manner or form whatsoever,' as provided by the Declaration of Trust. There is no question that the trusts were operated as a unit. We see no reason why the separate legal entity of a business trust cannot be merged in another business trust and such separate entity be disregarded in a case of this kind the same as it would be if these syndicate were corporations. This merger took place before the adjudication in bankruptcy, and we think the Bilyou Lease, in equity at least, became a part of the Gusher Syndicate's property prior to the adjudication in bankruptcy and hence passed to the Trustee upon such adjudication. The Trustee in Bankruptcy took possession of the assets of the Lyvers estate and liquidated them the same as he did the property of the Gusher Syndicate. The Referee in Bankruptcy paid the debts

of Lyvers, Trustee, upon an equal basis with the debts of the Gusher Syndicate" (53 Fed. (2d) 39).

In the concluding paragraph of the Circuit Court of Appeals opinion is set forth so fair a discussion of the equities in this case that we quote again:

"* * * It is true that the owners of the units in the Lyvers Syndicate have undoubtedly been swindled by the operations of Lyvers and the Morrises. Persons who buy units in a trust which confers such powers upon the trustee, as the trust articles did here, may reasonably expect trouble, and it is strange that anyone can be found to purchase units in such a trust where absolute power was given to Lyvers not only to carry on the business and to merge the trust or dispose of its property as he chose, but also to transmit his power to a successor selected by him. The equities of the creditors of both syndicates and the equities of appellee's predecessor in title were we think much stronger than the equities of the beneficial owners of the Lyvers Syndicate. There is no claim that appellee's predecessor was guilty of any fraud or wrong-doing. * * * If title did not pass to the Bilyou lease by the transfer from the trustee in bankruptcy, it did not pass as to the other properties of the Lyvers Syndicate. Such holding would undo the entire transaction after creditors have been paid and the unit holders have accepted dividends, although very meager, out of the proceeds of the sale." (53 Fed (2nd) 27, 39.)

POINT II.

The proceedings upon the petition filed by Zug, *et al.*, in a class proceeding, for the benefit of all unitholders of the Mike Lyvers Syndicate constitute *res adjudicata*.

On March 18, 1925, a petition was filed before the Referee in Bankruptcy by Zug and two other unitholders of the Mike Lyvers Syndicate (R. 62). This was done at the instance of Dr. McComb, acting on behalf of the unitholders of the Mike Lyvers Syndicate (R. 162).

The petitioners alleged that the suit was brought on behalf of themselves and all other persons similarly situated (R. 63); and in their petition set out the history of the organization of the Mike Lyvers trust; the institution of the bankruptcy proceedings against the Gusher Syndicate and Harry N. Morris, Trustee (R. 66); the denial that the Mike Lyvers Syndicate was in any sense responsible for the liabilities of the bankrupt syndicate (R. 65); the intervention proceedings brought by Mike Lyvers; the execution by Lyvers of the quitclaim deed of October 13, 1924, to H. M. Barney, Trustee in Bankruptcy; the invalidity of said deed; that it had been procured by threats, for a consideration of $600.; that it constituted a fraudulent conveyance of the interest of the petitioners and those similarly situated; and that said deed should be cancelled (R. 68). The prayer for relief in the petition was in the alternative either (1) for setting aside the sale of the Bilyou lease to the Natural Gas & Petroleum Corporation (R. 71); or (2) for an accounting of the moneys in the hands of the Trustee in Bankruptcy which money represented the pro-

ceeds of sale of the Bilyou, Mullens and Jonette leases (R. 70).

Attached to the petition was an affidavit dictated by Dr. McComb (R. 165) but signed by Mike Lyvers, in which he stated that he executed the conveyances to the Trustee in Bankruptcy under the belief that unless he did so he would be sent to prison for contempt of court; and that one of the conveyances was in consideration of the allowances of his (salary) claim in bankruptcy for $600 (R. 72). This Barney emphatically denied at the trial.

To that petition the Trustee in Bankruptcy filed a response, denying the allegations and asserting ownership in the bankrupt estate (R. 73). After a hearing upon the petition and response, the Referee in Bankruptcy entered an order denying the prayer of the petition (R. 82). No review of this order was ever sought in the District Court.

This proceeding, we submit, constitutes *res adjudicata*, estopping the petitioner from maintaining the suit at bar. The Circuit Court of Appeals did not find it necessary to consider this point because of its holding in respect of the Mike Lyvers intervention (53 Fed. (2nd) 27, 31). We here present it as a defense upon which we think that we are entitled to rely.

With respect to this defense, the petitioner contends (1) that the Referee was without jurisdiction, and (2) that the Referee's order denying the petition was not binding upon the unitholders as a class.

(1) *Jurisdiction of Referee.*

The substance of the petitioner's first contention is that the Bankruptcy Court had no power to adjudicate the issues

presented by the petition; and further, that the petition having been filed after the sale and execution of the deed to the purchaser, there was no *res* remaining in the Bankruptcy Court with reference to which title could be adjudicated.

The petitioner further argues that the issues presented by the Zug petition constituted a controversy in equity, and not a proceeding in bankruptcy, having in mind Section 23 of the Bankruptcy Act of 1898, where the distinction is there made between "controversy at law and in equity as distinguished from proceedings in bankruptcy". Jurisdiction of all controversies at law and in equity was then vested in the United States Circuit Courts. Jurisdiction over such controversies as constitute "proceedings in bankruptcy" is left to the summary jurisdiction of the Bankruptcy Court. It is now generally recognized that where property has come into the possession of the Bankruptcy Court, then, that Court has jurisdiction to determine the title to the property and the issue, accordingly, is denominated a proceeding in bankruptcy: (*In re Rochford,* 124 Fed. 182.)

Possession of the properties standing in the name of Mike Lyvers, Trustee, had been in the Bankruptcy Court since November, 1923, up until the execution of the deed of March 2, 1925, to the Natural Gas & Petroleum Corporation. The confirmation of the deed of sale by the Trustee in Bankruptcy to the Natural Gas & Petroleum Corporation did not deprive the Bankruptcy Court of the jurisdiction which it once had.

The purchaser, by operation of law, became a party to the proceeding and subject to the summary jurisdiction of the Bankruptcy Court. There is no doubt that the Bankruptcy Court, upon proper cause shown, could set aside the sale of the property and restore the property to the Mike Lyvers

Syndicate, if it so determined. *Champlin Refining Company* v. *Bailey,* 23 Fed. (2nd) 657 (C. C. A. 10th), and *Champlin Refining Company* v. *Bailey,* 36 Fed. (2nd) 655 (C. C. A. 10th). In these two cases it was held that the Bankruptcy Court had jurisdiction upon the petition of creditors of the bankrupt estate to set aside a Trustee's sale after its confirmation, the Circuit Court of Appeals for the Tenth Circuit expressly holding that such a petition presented an issue constituting "a proceeding in bankruptcy".

By the same token, the prayer of Zug, *et al.,* to set aside the sale to the Natural Gas & Petroleum Corporation presented an issue constituting "a proceeding in bankruptcy". Inasmuch as possession of the property had been in the Bankruptcy Court prior to the sale, the summary jurisdiction of the Bankruptcy Court attached to consider that prayer. *Whitney* v. *Wenman,* 198 U. S. 539.

Jurisdiction was also vested in the Bankruptcy Court to determine whether the petitioners were entitled to the alternate relief, namely, an accounting between the Mike Lyvers Syndicate and the Gusher Syndicate and a turnover of the balance received from the sale of the properties standing in the name of Mike Lyvers, Trustee. The fund or *res* out of which settlement would be made was in the hands of the Bankruptcy Court. This possession the unitholders admitted in their petition; as well as the right of the Bankruptcy Court to charge this fund with its proportionate share of the debts and expenses incurred during the joint operation of the properties both prior and subsequent to bankruptcy.

Finally, it must be remembered that the unitholders invoked the jurisdiction of the Bankruptcy Court and never challenged it.

(2) *Identity of Issues and Subject-Matter.*

The issues determined in the Zug, *et al.*, proceeding are identical with those now litigated in the case at bar; and both controversies relate to the same subject-matter.

The prayer of the petitioner for an accounting, a turnover of the balance and for general relief, presented squarely to the Bankruptcy Court the question of ownership of the properties, including the Bilyou lease, standing in the name of Mike Lyvers, Trustee. The contest in reality was between the Trustee, representing the bankrupt estate, and the Lyvers Syndicate.

The petition, summarized, admitted possession and operation of the Lyvers property by the Trustee in Bankruptcy under a joint operating agreement; denied the Trustee's right to sell those properties; asked that the sale be set aside; and at the same time prayed for a general accounting between it and the bankrupt Syndicate, and for a turnover of the proceeds of all moneys found due it as a result of the joint operation (R. 62).

The response of the Trustee categorically denied all these allegations and averred ownership in the Gusher Syndicate of all the Lyvers property, as well as of the proceeds derived from the sale and the operation of those properties (R. 73). The question of title to the Bilyou lease or ownership of the proceeds of sale was sharply in issue between the two syndicates.

(3) *Identity of Parties.*

The determination of the Referee in Bankruptcy denying the relief sought in this representative action brought by Zug, *et al.*, on behalf of all the unitholders in the Mike Lyvers

Syndicate is binding upon those unitholders who did not actually appear. Equity Rule 38 provides:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Controlling is the rule laid down by this Court in *Smith v. Swormstedt,* 16 How. 288, 303:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

This quotation was cited with approval in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, 672.

The fact that the Natural Gas and Petroleum Corporation was not, by name, made a party defendant is immaterial; for it is a well settled doctrine that a purchaser at a judicial sale, by reason of his purchase, becomes a party to the proceeding in which the sale is had, and is, therefore, bound as a party to the record by any orders that may be subsequently made in the course of the proceeding relative to the sale. *Axelrod* v. *Osage Oil Refining Co.,* 29 Fed. (2nd) 712; *Champlin Refining Co.* v. *Bailey,* 36 Fed. (2nd) 655.

Accordingly, if the order of the Referee had been in favor of the petitioners, the Natural Gas and Petroleum Corporation would have been bound by such order; or could have challenged the order by filing a bill of review or appeal from it. The response filed by the Trustee in Bankruptcy to the petition raised all the issues that the Natural Gas and Petroleum Corporation could have raised, and that response must be treated as having been filed not only on behalf of the creditors but also on behalf of the purchaser at the sale.

We respectfully submit that the proceeding in the intervention filed by Zug and his associates, and the order of the Referee thereon, is binding as *res adjudicata* and estops the petitioner from maintaining this suit.

POINT III.

The petitioner and the unitholders of the Mike Lyvers Syndicate are estopped by laches to maintain this action.

Assuming arguendo, that the Mike Lyvers Syndicate had some claim of title to the Bilyou lease and other properties standing in the name of Mike Lyvers, Trustee, we submit that his successor Trustee and the unitholders are estopped by laches from now bringing this action.

The Courts strictly hold that those who have claims to mineral or oil property must act with the utmost diligence in bringing actions to enforce them: this for the reason that the uncertain value of the property may, in the case of development, be subject to a tremendous increase; and for the reason that it is unjust to allow one claimant to sit by while another, at his own risk, expends large sums of money in ex-

ploration and development. In *Patterson* v. *Hewitt*, 195 U. S. 309, 321, this Court said:

> "Persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

See also *Twin-lick Oil Co.* v. *Marbury*, 91 U. S. 587, 593; *Johnston* v. *Standard Mining Company*, 148 U. S. 360. A delay of two to four years has been fatal to the assertion of the claimant's rights. *Taylor* v. *Salt Creek Consol. Oil Co.*, 285 Fed. 532, 540 and cases there cited.

All the elements of laches are present in this case: (1) the invasion of the rights (assumed arguendo) of the party claiming to be owner; (2) notice on his part of such invasion; (3) delay in the prosecution of his rights; and (4) circumstances rendering it inequitable to grant the relief prayed for.

The record shows clearly that the rights of Lyvers, as Trustee, were invaded in August, 1923, when Williford, the State Receiver, took over the properties of the Mike Lyvers Syndicate (R. 141). The properties were thereafter claimed by and were in the possession of Barney, the Trustee in Bankruptcy, continuously from November, 1923, to March 2, 1925, and have since been in the possession of his grantee and its successor, this respondent (R. 142).

Notice of this invasion was brought home to Mike Lyvers, the Trustee, when Williford took possession. He knew from the beginning that Williford and then Barney had possession of and were claiming the title to the property (R. 30). He had knowledge of the sale of the properties by the Trustee in Bankruptcy to the Natural Gas and Petroleum Corporation on March 2, 1925. The subsequent development of the Bilyou lease and its great enhancement in value was known to

him (R. 163-164). The petitioner, successor Trustee to Lyvers, is charged with Lyvers knowledge.

The circumstances which brought home knowledge of the bankruptcy proceedings to the unitholders have already been stated. Suffice it to say that if there was one who did not have actual knowledge of the invasion of his rights, he was in possession of enough facts to put him on inquiry. *Johnston v. Standard Mining Company, supra,* page 370.

In spite of this notice to Mike Lyvers, Trustee, the petitioner, his successor Trustee, and the unitholders, this suit (Dec. 20, 1927) was not brought until more than four years after Barney, as Trustee in Bankruptcy, first asserted title to the properties standing in the name of Mike Lyvers, Trustee, and took possession of them; and over eighteen months after the lease had been fully developed (R. 182).

The suggestion is made by the Circuit Court of Appeals that the doctrine of laches might not apply in the case of a faithless trustee. Reference is made to the case of *Willard v. Campbell,* 77 Mont. 30, 248 Pac. 219. In that case the Trustees of a trust syndicate executed a contract between the syndicate and a joint stock company which the Trustees controlled. The contract was highly disadvantageous for the syndicate, but very profitable for the Trustees. Suit was brought against the oil company by successor Trustees to set aside the contract. In respect to the defense of laches, the Court held that the syndicate could not be bound by the failure of the faithless Trustees to bring an action to undo a transaction in which the Trustees obtained secret profits. Furthermore, it was not shown that any of the unitholders during that period had notice of the situation. That case is plainly inapplicable to the situation here.

Lyvers had nothing to gain by the Trustee in Bankruptcy's seizure of the property of the Mike Lyvers Syndicate. Indeed he sought to defeat that seizure and reclaim the property through the intervention filed by him in February, 1924. The fact that Lyvers had been indicted for conspiracy to defraud his unitholders in the organization and conduct of the trust; and had pleaded guilty in October, 1924, to such indictment, has nothing to do with his failure promptly to press a suit similar to this action (R. 117). Whatever may have been the misconduct of Lyvers in the original promotion of the trust syndicate, that misconduct in no way related to the seizure by the Trustees in Bankruptcy of the Lyvers property, or delay in bringing this action.

Lyvers remained Trustee and had the power and duty to institute suit to protect the interests of his beneficiaries. His failure to do so, therefore, constitutes laches imputable to the petitioner, his successor, and to his beneficiaries. *Cf. Mathieson* v. *Craven,* 228 Fed. 345, 379; Perryon Trusts (7th Ed.) Vol. 2, #850.

Petitioner became Trustee in October, 1925 (R. 165). In January, 1926, he filed a bill containing allegations identical with those in the case at bar in the United States District Court for the Eastern District of Arkansas. This suit was dismissed for lack of jurisdiction in April, 1927, approximately sixteen months after the institution of suit; and this delay of decision was largely attributed to petitioner's inactivity (R. 188). Another eight months elapsed between its dismissal and the institution of the case at bar. Argument is hardly necessary to demonstrate that the present suit has not been prosecuted diligently.

By the same token the unitholders have slept on their rights. With knowledge of the situation they acquiesced in

the possession and administration of the Lyvers property by the Trustee in Bankruptcy. Over two-thirds of them affirmed his right to sell the property by the acceptance of dividends on their claims as deferred creditors (R. 147).

The situation, when the Natural Gas & Petroleum Corporation purchased the Bilyou lease from the Trustee in Bankruptcy, was this: For a year and a half the properties of the Lyvers trust had been administered in bankruptcy with the knowledge, acquiescence and consent of Lyvers, as Trustee, and of his unitholders and their representatives, Dr. McComb and the Reorganization Committee. The bankruptcy proceeding, in fact, had been initiated by this committee. The unitholders, during the entire course of the bankruptcy administration had been informed of, and had indeed, by claims, affirmed the right of the Trustee in Bankruptcy to sell. The purchaser bought the properties for a valuable consideration and believed in good faith that it was acquiring indisputable title. From March 1, 1925, to January 1, 1928, $221,554.33 had been expended in a development of these properties (R. 184, 185). Diligent steps taken by those asserting claims to the Bilyou lease, always assuming their validity, would have prevented this change of position.

All of the risk was assumed by the Natural Gas and Petroleum Corporation. Had the venture proved unsuccessful, all of the money expended in drilling would have been lost, and that loss would have been borne by the purchaser and not the petitioner. No risk was assumed by the petitioner. Indeed, this action was not started until a year and a half after it had been fully developed into valuable oil property. "It is inconceivable that any controversy would have ever arisen but for the lucky strike at the mine." *Swan* v. *Daven-*

port, 119 Ia. 46, 93 N. W. 65, 66. It would be inequitable to allow the petitioner now to enjoy the profits made possible by the capital *and enterprise* of the respondent and its predecessor in title.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 700.—October Term, 1931.

John H. Page, Trustee, Etc., Petitioner, *vs.* Arkansas Natural Gas Corporation. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner brought this suit in the Arkansas Chancery Court against respondent's predecessor in interest to quiet the title to an oil and gas lease. The cause was removed to the United States District Court for Western Arkansas, where a trial of the issues resulted in a judgment for respondent, which was affirmed by the Court of Appeals for the Eighth Circuit. 53 F. (2d) 27. Both courts held that the issue with respect to the ownership of the lease was *res adjudicata* by reason of a proceeding before a referee in bankruptcy, sitting in the district in which the issues with respect to the title presented here, had been decided against the predecessor of petitioner and in favor of the trustee in bankruptcy, through whom respondent acquired its title to the lease.

The receiver in the bankruptcy proceeding, later appointed trustee, had gone into possession of the lease, claiming it as property of the bankrupt. Lyvers, petitioner's predecessor, filed a petition before the referee, claiming title to the lease, asking that he be put in possession and that the trustee be ordered not to sell the lease. The trustee answered, setting up that Lyvers was trustee of the lease for the bankrupt, and asking that Lyvers execute a deed of the property to the trustee. The matter was heard by the referee, who ordered Lyvers to execute the conveyance. The order was affirmed by the District Court and in conformity with it Lyvers then conveyed the lease to the trustee.

The attempt made in the present suit to relitigate the issues involved in the bankruptcy proceeding, is justified chiefly on the ground that the referee in bankruptcy was without jurisdiction to try the issues presented in the proceeding before him and that, for that reason, the order was void and could not operate to adjudicate the issues tendered in the present suit. This Court granted certiorari, — U. S. —, to resolve the jurisdictional ques-

tion. Many and complicated questions of fact are involved and were argued here, but as they have been found in favor of the respondent by both courts below, we do not review them, *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, and we confine ourselves to the question of the jurisdiction of the referee in bankruptcy.

The court below held that the referee in bankruptcy had jurisdiction to decide the issues raised by the petition and answer by virtue of the fact that the trustee had gone into possession of the lease, and that possession gave the referee as a court of bankruptcy jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. *Murphy* v. *John Hofman Company*, 211 U. S. 562. It also held that the referee had power to make the order, since Lyvers had participated in the litigation without objecting to its summary form until after the order had been made. We think that the judgment should be affirmed.

The right asserted before the referee by the trustee in bankruptcy to compel a conveyance to the bankrupt of property adversely claimed, is one which may be asserted by the trustee in a plenary suit. By § 23 (a) of the Bankruptcy Act and § 24 of the Judicial Code, District Courts of the United States, which by § 1 (8) of the Bankruptcy Act are courts of bankruptcy, are given jurisdiction of all controversies in law or equity between trustees and adverse claimants concerning the property claimed by the trustee. And by § 23 (b), "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant . . ." For reasons stated at length in the opinion in No. 714, *MacDonald* v. *Plymouth County Trust Co.*, decided this day, we hold that the referee is a court within the meaning of § 23 (b) and that, respondent's predecessor having consented to litigate the issues presented by the petition and answer before the referee, the latter had jurisdiction to decide the issues presented. The order of the referee, in the bankruptcy proceeding, affirmed by the District Court, therefore adjudicated those issues between the parties and they may not be relitigated in the present suit by their successors in interest.

Affirmed.